IN THE

# Supreme Court of the United States

No. 426

COLEMAN ULLNER,

*Appellant,*

v.

THE STATE OF OHIO,

*Appellee.*

On Appeal from the Supreme Court of Ohio

## JURISDICTIONAL STATEMENT


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COLEMAN ULLNER,

*Appellant,*

v.

THE STATE OF OHIO,

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---

**On Appeal from the Supreme Court of Ohio**

---

## JURISDICTIONAL STATEMENT

Appellant appeals from the final orders of the Supreme Court of Ohio entered May 21, 1958, overruling appellant's application for rehearing, and its judgments entered April 30, 1958, affirming the judgments of the Court of Appeals of Butler County, Ohio, which affirmed the judgments of the Common Pleas Court of Butler County, Ohio, which affirmed the judgments of conviction of appellant of violations of the Sunday closing laws by the Municipal Court of the City of Hamilton in Butler County, Ohio, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeals and that substantial constitutional questions are presented. This single jurisdictional statement is filed pursuant to subparagraph 3 of Rule 15 of this Court.

## OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported in 167 O. S. 521, 150 N. E. (2d) 413. The opinion of the Court of Appeals of Butler County, Ohio, is reported in 143 N. E. (2d) 849. The opinions of the Court of Common Pleas of Butler County and the Municipal Court of the City of Hamilton have not been reported. Copies of said opinions are attached hereto as Appendices "A," "B," "C" and "D." The judgment entries of the Supreme Court of Ohio and the entries of that court denying appellant's application for rehearing are attached hereto as Appendices "E" and "F."

## JURISDICTION

These proceedings were initiated by the filing of affidavits by a private citizen in the Municipal Court of the City of Hamilton, Ohio, charging the appellant with the crimes of requiring a person in his employ or under his control to engage in common labor on Sunday and opening or causing to be opened a building or place for the transaction of business on Sunday, March 27, 1955, in violation of Section 3773.24 of the Revised Code of the State of Ohio. The judgment of the Supreme Court of Ohio was entered on April 30, 1958, appellant's application for rehearing was overruled by the Supreme Court of Ohio on May 21, 1958, and notices of appeal were filed in that court on August 11, 1958. The jurisdiction of the Supreme Court to review these judgments by appeal is conferred by Title 28, United States Code, Section 1257(2). These appeals raise the question whether the Ohio statute is repugnant to the First and Fourteenth Amendments to the Constitution of the United States. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in these cases on appeal: *Zorach* v. *Clauson*, 343 U. S. 306 (1952); *Winters* v. *New York*, 333 U. S. 507

(1948); *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939); *McCollum* v. *Board of Education*, 333 U. S. 203 (1948); *Cumberland Coal Co.* v. *Board*, 284 U. S. 23 (1931); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Superior Films* v. *Department of Education of Ohio*, 346 U. S. 587 (1954).

## STATUTES INVOLVED

The statute of the State of Ohio whose validity is involved is Section 3773.24 of the Revised Code of Ohio, which reads as follows:

> "*Laboring or requiring employee to labor on Sunday.*
>
> "No person who is over fourteen years of age shall engage in common labor or open or cause to be opened, a building or place for transaction of business or require a person in his employ or under his control to engage in common labor on Sunday. In prosecutions under this section complaints shall be made within ten days after a violation.
>
> "This section does not apply to work of necessity or charity, and does not extend to persons who conscientiously observe the seventh day of the week as the sabbath, and abstain thereon from doing things prohibited on Sunday.
>
> "This Section does not prevent emigrating families from traveling, watermen from landing their passengers, or keepers of toll bridges, tollgates, or ferries from attending them on Sunday."

Other statutes of the State of Ohio which are related to this question are Sections 3773.23, 3773.25, 3773.26, 3773.99, 4107.46, 4109.22, 4301.03(I), 4301.22(D), all of which are set forth in Appendix "G."

## QUESTIONS PRESENTED

The following questions are presented by these appeals:

1. Does Section 3773.24 of the Revised Code of Ohio,

which was held to prevent the appellant from opening or causing to be opened a building or place for the transaction of business on Sunday and from requiring a person in his employ or under his control to engage in common labor on Sunday, constitute a law respecting the establishment of religion or prohibiting the free exercise thereof in violation of the First and Fourteenth Amendments to the Constitution of the United States?

2. Is Section 3773.24 of the Revised Code of Ohio so vague and indefinite as to deprive appellant of liberty or property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, particularly in view of the exceptions therein of "work of necessity or charity" as interpreted by the Supreme Court of Ohio in its opinion in these cases in which it said that "the word 'necessity' is an elastic one and what constitutes a work of necessity is often a question of fact dependent on the circumstances surrounding the particular case?"

3. Does Section 3773.24 of the Revised Code of Ohio deny to appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States in that the legislature of the State of Ohio has provided so many exceptions to said law that appellant is unduly discriminated against?

4. Does the fact that the administrative and enforcement officers of the City of Hamilton and State of Ohio have consistently failed to enforce the provisions of Section 3773.24 of the Revised Code of Ohio and related sections relating to Sunday activities with respect to businesses and employment in general and businesses similar to appellant's in particular, in and about the City of Hamilton, constitute undue discrimination against appellant, denying him the equal protection of the laws?

## STATEMENT OF THE CASE

The proceedings herein were begun by affidavits filed in the Municipal Court of the City of Hamilton in Butler County, Ohio, neither of which was filed by a police or other enforcement officer but by an attorney at law who went to the store that was operated by an Ohio corporation of which the appellant was president on Sunday, March 27, 1955, for the specific purpose of making purchases of merchandise (Record, p. 51). The affidavits (Supplemental Record, pp. 3 and 4) charged the appellant with opening or causing to be opened a place of business on Sunday and with requiring a person in his employ or under his control to engage in common labor on Sunday, in violation of law. Both affidavits said that the business or work was not a work of necessity or charity and that the appellant did not consistently observe the seventh day of the week as the Sabbath, but there was no proof of this latter point. The two cases were tried together. Prior to the introduction of evidence in either case the defendant moved to dismiss and demurred to said complaints. One of the grounds of the demurrer was that the statute involved violated the First and Fourteenth Amendments to the Constitution of the United States on the grounds of the tendency to establish a religion and undue discrimination in enforcement and because of other statutes exempting various occupations and persons (R. 32, *et seq.*).

The complaining witness is an attorney (R. 53). On the day in question he went to Rink's Bargain City and saw a police officer directing traffic in front of the store (R. 44). He went in contemplation of the proceedings in question (R. 51). The merchandise on sale consisted of sporting goods, garden tools, men's and women's clothing, hardware, garbage cans, kitchen utensils, chairs and costume jewelry, as well as some automotive equipment (R. 49, 50).

An attempt on cross examination to show the class of persons who were making purchases, in order to demonstrate that the operation was a work of necessity, was ruled out by the court (R. 51). Counsel were also prevented from showing that the witness was employed to make the purchases (R. 52).

There was no evidence that the appellant had opened the store on the day in question. The evidence was that there were five persons, none of them identified, who had the authority to open it (R. 65). The court apparently thought that the fact that the business was being operated by a corporation of which appellant was president was sufficient evidence on this subject.

As to employment, the only employee who testified, Isadore Bier, testified that he was employed not by appellant but by appellant's brother and that when he was hired he had a choice of working either Sunday or Wednesday and he took Wednesday off (R. 83). He said no one required him to work on Sunday, March 27, 1955 (R. 84).

The witness was asked about his working previously on Sundays at another department store in Hamilton, Ohio, but this evidence was refused by the court (R. 85). The court also refused to permit him to testify about other stores and factories that were open on Sundays in and around Hamilton to his personal knowledge and a proffer was made of a list of those stores and factories (R. 86, 110). These show the discrimination against appellant.

Appellant was convicted and on appeals his convictions were affirmed successively by the Common Pleas Court of Butler County, the Court of Appeals of Butler County and the Supreme Court of Ohio. In all of these courts the constitutional questions were raised.

In the Supreme Court of Ohio the constitutional questions relating to religion and discrimination were expressly passed upon in the first and third paragraphs of the sylla-

bus which represent the law in the State of Ohio, *State, ex rel. Canada* v. *Phillips*, 168 O. S. 191 (Advance Sheets of Ohio Bar for July 14, 1958), 151 N. E. (2d) 722. In the second paragraph of the syllabus the Supreme Court said:

> "'Work of necessity or charity' is exempted from the operation of Section 3773.24, Revised Code. The word, 'necessity,' is an elastic one, and what constitutes work of necessity is often a question of fact dependent on the circumstances surrounding the particular case."

This interpretation of the statute by the Supreme Court first demonstrated a vagueness that, in the opinion of counsel, rendered the statute so vague as to be in violation of the Fourteenth Amendment under the decisions of this Court. Counsel for appellant, therefore, immediately raised this question of vagueness in an application for rehearing filed in the Supreme Court of Ohio (R. 156, *et seq.*).

## THE QUESTIONS ARE SUBSTANTIAL

The attack in this case is on the Sunday blue laws from various points of view. In the first place we claim that they violate the religious guarantees of the First Amendment as incorporated in the Fourteenth Amendment to the Constitution of the United States. In the second place we claim that by reason of the interpretation of "work of necessity" as indefinite, by the Supreme Court of Ohio, they do not satisfy the guarantee of definiteness required in a criminal statute by the due process clause of the Fourteenth Amendment. In the third place the exemptions that have been made in such laws since they were originally enacted constitute undue discrimination. In the fourth place the arbitrary and hit or miss methods of enforcement

(generally unenforcement) of the statutes constitute unlawful discrimination in fact.

**Previous Consideration of Sunday Blue Laws By This Court.**

All of these matters raise substantial questions under the Fourteenth Amendment to the Constitution of the United States which should be passed on by this Court so that they may be set at rest one way or another. This Court has delivered opinions on the Sunday blue laws in only two cases, *Hennington* v. *Georgia*, 163 U. S. 299 (1896), and *Petit* v. *Minnesota*, 177 U. S. 164 (1900). In the former case the question involved was whether the running of a freight train on Sunday, contrary to the Georgia statute, constituted an interference with interstate commerce. The Court upheld the law. No question was raised as to whether it tended to establish a religion or interfere with the freedom of religion, since at that time this Court held that the First Amendment imposed restrictions only on the federal legislature and authorities, and not on the states. *Patterson* v. *Colorado*, 205 U. S. 454, 462 (1907); *Prudential Ins. Co.* v. *Check*, 295 U. S. 530, 543 (1922). It was not until 1925, in *Gitlow* v. *New York*, 268 U. S. 652, that this Court decided that the guarantees of the First Amendment, incorporated in the Fourteenth Amendment, apply to the states as well as to the federal government.

In *Petit* v. *Minnesota*, *supra*, the law considered provided that all labor on Sunday was prohibited excepting works of necessity or charity. The legislature provided that keeping open a barber shop on Sunday should not be deemed a work of necessity or charity. The question was whether this was unduly discriminatory, in violation of the Fourteenth Amendment. This Court held that it was reasonable classification and, therefore, constitutional. The

guarantees of the First Amendment were not raised in that case either.

Recently this Court has been asked to consider the constitutionality of blue laws of various states in the following cases and has refused to do so:

> *People* v. *Friedman*, 302 N. Y. 75, 96 N. E. (2d) 184, appeal dismissed 341 U. S. 907 (1951, October term 1950, No. 640). While several of the questions raised in the instant appeal were mentioned in that case, the record on appeal in this Court shows (page 92) that counsel in the trial court said he was not contesting the constitutionality of the state law, but "we contest only its constitutionality with respect to one who observes Saturday as his day of rest." That question is not involved in the instant case.
>
> *Taylor* v. *Pine Bluff*, 226 Ark. 309, 289 S. W. (2d) 679, *certiorari* denied 352 U. S. 894 (October term 1956, No. 324). The only complaint in that case was discrimination in the enforcement as it was claimed that the statute, though general, was enforced only against grocery stores. The petition for *certiorari*, page 3, says:
>
> > "The Arkansas Statute involved is valid, because on its face it is not discriminatory for it prohibits every kind of business from staying open on Sunday."
>
> *Hickinbotham* v. *Williams*, 227 Ark. 126, 296 S. W. (2d) 897, *certiorari* denied 353 U. S. 961 (1957, October term 1956, No. 923). The only question involved in this case was whether the petitioner could be fined for contempt for violating the injunction against opening his grocery store on Sunday.
>
> *Gundaker Central Motors Inc.* v. *Gassert*, 23 N. J. 71, 127 A. (2d) 566, appeal dismissed 354 U. S. 933 (1957, October term 1956, No. 934). No question under the First Amendment was raised in this case. It involved

the Sunday closing of dealers in motor vehicles. The trial court had held this statute unconstitutional because of discrimination, but the Supreme Court of New Jersey upheld it largely on the ground of the potential traffic accident hazard.

There is now pending in this Court the case of *Grochowiak* v. *Pennsylvania*, on appeal from the decision of the Superior Court of Pennsylvania reported in 184 Superior Court 522 and 136 A. (2d) 145 (1957), No. 166, October term 1958. That case involves the closing on Sunday afternoon of a moving picture theater.

Notice of appeal from the same decision of the Supreme Court of Ohio of which this appellant is complaining has already been fled in the Supreme Court of Ohio by counsel for Messrs. Kidd and Mills who were convicted in the Municipal Court of Cincinnati in Hamilton County, Ohio. That case involves the closing on Sunday of a grocery store in a poor neighborhood of that city.

**The Recurrence of a Question Has Been Recognized By This Court as a Ground for Consideration on the Merits.**

In *Teamsters Union* v. *Vogt, Inc.*, 354 U. S. 284, 77 S. Ct. 1166 (1957), this Court was presented with one more in a long series of cases in which it had been required to consider the limits imposed by the Fourteenth Amendment on the power of a state to enjoin picketing. It had granted a motion to dismiss for lack of a substantial federal question in a similar case. In view of the recurrence of the question this Court thought it advisable to grant *certiorari* (page 287 of 354 U. S.).

In considering the blue laws of the various states we cannot turn back the clock to colonial times when they were first enacted or even to 1868 when the Fourteenth Amendment was adopted, but we must consider them in the light of their full development and present place in American

life throughout the country. To paraphrase this Court's opinion in *Brown* v. *Board of Education*, 347 U. S. 483 (1954), at pages 492 and 493, only in this way can it be determined if the Sunday work and closing laws deprive this plaintiff of the equal protection of the laws, as well as other constitutional guarantees. See Editorial Note, "Sunday Blue Laws: An Analysis of their Position in our Society" in 12 Rutgers Law Review 505 (Spring 1958), and "Sunday Statutes in a Modern Community," 61 Yale Law Journal 427.

**The Ohio Blue Laws Are Laws Respecting the Establishment of Religion.**

The first statutory reference to Sunday activities in the Ohio territory is in the laws enacted by the governor and judges of the North-West Territory in 1792, 1 Laws of the North-West Territory 27. The act in question reads:

"First Day of the week.

"Whereas mankind in every stage of informed society, have consecrated certain portions of time to the particular cultivation of the social virtues, and the public adoration and worship of the common parent of the universe: and whereas a practice so rational in itself, and conformable to the divine precepts is greatly conductive to civilization as well as morality and piety; and whereas for the advancement of such important and interesting purposes, most of the christian world have set apart the first day of the week, as a day of rest from common labours and pursuits; it is therefore enjoined that all servile labour, works of necessity and charity only excepted, be wholly abstained from on said day."

This law, as amplified and amended from time to time by the legislature, has been carried through to the present sections 3773.23 to 3773.26, inclusive, of the Revised Code of Ohio.

In 1829 and 1830 there was an attempt by various religious organizations to have the United States Congress amend the Postal Department law to prohibit delivery of letters and other operations on Sunday. Senator Richard M. Johnson of Kentucky, later Vice-President of the United States, made committee reports both to the Senate and the House on the subject, in which he expressed the opinion that such a prohibition would constitute a legislative decision of a religious controversy. The reports are set forth in American State Papers and Related Documents on Freedom of Religion, 4th Revised Edition, published in 1949 for the Religious Liberty Association, Washington, D. C., beginning at page 210. See also American State Papers, Class VII, Post Office Department, pp. 211, 212 and 229-31. The reports were concurred in by Congress. It is significant that the Congress has never adopted a Sunday closing law for the District of Columbia.

For a modern statement regarding Sunday closing laws see a quotation from Mayor Phil Van Every of Charlotte, North Carolina, in 52 Liberty, a Magazine of Religious Freedom, 26 (first quarter 1957), in breaking a tie vote of council to defeat a proposed Sunday closing ordinance. See also A Critical History of Sunday Legislation from 321 to 1888 A. D. by A. H. Lewis, D. D., published in New York by D. Appleton & Co. in 1888, pages viii and ix of the preface.

The exception from the operation of the Sunday closing law of those who "conscientiously observe the seventh day of the week as the sabbath" (R. C. Sec. 3773.24) shows a religious test for exceptions to the act. The provisions of the Sunday closing laws which permit professional baseball, motion picture exhibitions and gun club trap shooting only after noon on Sunday (R. C. Secs. 3773.23 and 3773.26) demonstrate that their purpose is to encourage church attendance on Sunday morning.

The decisions of this Court in *McCollum* v. *Board of Education*, 333 U. S. 203 (1948), and *Board of Education* v. *Barnette*, 319 U. S. 624 (1943), as well as the language in *Everson* v. *Board of Education*, 330 U. S. 1 (1947) at pages 15 and 16, and various language in the opinions rendered by the justices of this Court in *Zorach* v. *Clauson*, 343 U. S. 306 (1952), along with the history of the blue laws in Ohio and their provisions in the light of modern living conditions, require this Court to review them in connection with the religious guarantees of the First Amendment. See also *United States* v. *Ballard*, 322 U. S. 78 (1944); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Jones* v. *Opelika*, 319 U. S. 103 (1943); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940).

**The Statute as Interpreted By the Supreme Court of Ohio Is Not So Explicit That All Men Subject to Their Penalties May Know What Acts It Is Their Duty to Avoid.**

An act so indefinite violates the guarantees of the Fourteenth Amendment to the Constitution of the United States. In *United States* v. *Brewer*, 139 U. S. 278 (1891), Mr. Justice Blatchford said at page 288:

> "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid."

In the instant case the Supreme Court of Ohio said that the word "necessity" was an elastic one and that what constituted work of necessity was often a question of fact dependent on the circumstances surrounding the particular case. Paragraph 2 of syllabus, 167 O. S. 521. Judge Zimmerman, in delivering the opinion said:

> "Of course, recognition and enforcement of the law (the Sunday closing law) depend largely upon the

> sentiment in a locality and the attitude of the law enforcement agencies of that community (pp. 527, 528)."

Whether a man can be convicted under the statute in question might depend on what was the sentiment of the judge or jury in that locality at the time of his trial. (See R. pp. 162 and 166 *et seq.*)

In the leading case of *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 (1921), which involved the constitutionality of the Lever Act, Section 4 of the Federal Food Control Act of 1917, as amended in 1919, making it a crime for any person to make "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," this Court declared that the Act did not fix an ascertainable standard of guilt or adequately inform the persons accused of violation of the nature and cause of the accusation against them. The Court said at page 89:

> "In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."

In *Musser* v. *State*, 333 U. S. 95 (1948), this court remanded to the Supreme Court of Utah a case in which the appellant had been convicted for conspiracy to "commit acts injurious to public morals." At page 97 this court said:

> "Standing by itself, it would seem to be warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for health, morals, trade, commerce, justice or order."

See also, *Winters* v. *New York*, 333 U. S. 507 (1948); *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939); *Champlin Rfg. Co.* v. *Commission*, 286 U. S. 210 (1932); and *Connally* v. *General Const. Co.*, 269 U. S. 385 (1926).

**The Provisions of Sections 3773.24 and Related Sections of the Revised Code of Ohio Are Unduly Discriminatory.**

(1) R. C. Sec. 3773.23 (App. 29a) permits the playing of baseball and the exhibition of motion pictures on Sunday except in the forenoon, but it does not permit football, basketball, hockey or other sports or exhibition by television or broadcasting by radio, and it expressly prohibits theatrical performances.

(2) R. C. Sec. 3773.24 is limited to engaging in "common labor" thereby permitting all other labor. This section also provides that it does not apply "to persons who conscientiously observe the seventh (7th) day of the week as the sabbath, and abstain thereon from doing things prohibited on Sunday."

(3) R. C. Sec. 3773.26 (App. 29a) permits the use of hunting instruments in trap shooting in the afternoon conducted under the auspices of a recognized hunt, trap shoot, rifle or game club of the State.

(4) R. C. Sec. 4301.22(D) (App. 34a) permits the sale of intoxicating liquor on Sundays until 2:30 A.M. Eastern Standard Time. The sale of beer and other malt beverages containing not more than 3.2 per cent of alcohol by weight is permitted all day Sunday under permits issued by virtue of R. C. Sec. 4301.03(I) (App. 34a).

(5) R. C. Sec. 3773.24 does not apply to persons under the age of fourteen (14) years.

(6) In 1949 (123 O. L. 55) the legislature in amending General Code of Ohio Section 13049, now R. C. Sec. 3773.23, eliminated the prohibition against "tenpins or other games of similar kind."

(7) In 1937 (117 O. L. 539), G. C. Sec. 1008-2, now R. C. Sec. 4107.46 (App. 30a), was enacted. This provided that no employer shall employ a female for more than forty-eight hours in any one week, or eight hours in any one day, or for more than six days in any calendar week, with certain exceptions. Subsection (C) of this section provides:

> (C) A female may be employed in more than one place of employment provided the aggregate number of hours such female is employed does not exceed eight in any one day or forty-eight in any one week.

(8) At the same session of the legislature Section 12996 of the General Code, now R. C. Sec. 4109.22 (App. 32a), was enacted (117 O. L. 543), which prohibited the employment of a boy under eighteen or a girl under twenty-one in connection with certain establishments or occupations, for more than six days in any calendar week, for more than forty-eight hours in any calendar week and for more than eight hours in any one day.

These sections contain no reference to any particular day of the week and, therefore, presumably persons could work on Sundays provided they did not work another day of the week. As a matter of fact, that is what happens in a great many manufacturing establishments and other lines of business in Ohio.

The Florida Supreme Court in the decisions of *Kelly* v. *Blackburn*, 95 S. (2d) 260 (Fla., 1957), and *Henderson* v. *Antonacci*, 62 S. (2d) 5 (Fla., 1952), had no difficulty in holding discriminations less than these rendered their Sunday closing law unconstitutional.

See *Morey* v. *Doud*, 354 U. S. 457 (1957) and cases therein cited. In that case this Court said at page 466:

> "Of course, distinctions in the treatment of business entities engaged in the same business activity

may be justified by genuinely different characteristics of the business involved. This is so even where the discrimination is by name. But distinctions cannot be so justified if the 'discrimination has no reasonable relation to these differences.' "

**The Appellant Is Denied the Equal Protection of the Law By Reason of the Arbitrary Enforcement Against Him While Violations By the General Public Are Consistently and Deliberately Disregarded.**

The appellant attempted at the trial to show that there was this systematic discrimination by public officials but this evidence, on objection of counsel for the appellee, was refused and the proffer was made (R. 85, 86, 110). Gasoline stations are open on Sunday all over the State of Ohio. These cannot be classed as works of necessity as there is no requirement that people travel on that day and for the small amount of gasoline that would be needed to perform necessary works within a small range of one's home, one could fill one's automobile tank the day before, just as the lower courts say that one must lay in one's groceries and other necessary supplies the day before Sunday. Furthermore, so-called drugstores that sell the same kind of merchandise as the appellant was selling are open all over the cities of Ohio on Sunday without interference from public authorities. In fact, their operation has been held to be a work of necessity. Factories do not hesitate to work overtime on Sunday and there is provision for this in collective bargaining agreements with unions. Used car lots are open, automobile dealers and realtors operate on Sunday. Public and private fishing lakes are open on Sunday though R. C. Sec. 3773.25 specifically probibits hunting and fishing on Sunday. R. C. Sec. 1541.07 provides in part:

"The lakes named in section 1541.06 of the Revised Code shall *at all times* be open to the public as resorts

for recreation and pleasure, including *hunting, fishing,* and boating." (Emphasis added.)

We have previously adverted to professional football, basketball, hockey, and theatrical performances that operate on Sunday and the list could be extended indefinitely.

Even the operation in question in the instant case was not ordered closed by public officials on Sunday (a policeman was directing traffic outside [R. 44]) but the information was filed by an attorney who was obviously acting for some private individual or group.

In other words the general attitude of public officials throughout the State of Ohio is to disregard the Sunday closing laws and the only time that they are enforced is not for the benefit of the health, safety, morals, or welfare of the public, but merely to serve some private end of a competitor or other small group. This is typical of the enforcement of the Sunday Blue Laws. See 12 Rutgers Law Journal, cited *supra,* at page 508.

An alleged police regulation, even though deemed to be valid when enacted, may become unconstitutional by reason of later legislation or the operation of later events. *Abie State Bank* v. *Bryan,* 282 U. S. 765 (1931).

Such discriminatory enforcement of a statute denies the appellant the equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States. *Cumberland Coal Co.* v. *Board of Revision,* 284 U. S. 23 (1931); *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886).

## CONCLUSION

The so called blue laws, which attempted to prohibit human activity not connected with religious worship on Sunday, have been tolerated in modern times because no serious attempt has been made to enforce them by public officials and pressure groups have persuaded the legisla-

tures to adopt exceptions which bear no reasonable relation to their avowed purposes. Where they have been enforced the effort has been sporadic and discriminatory. In many instances the attempt at enforcement is made by private individuals to suppress competition.

This Court should review their constitutionality in the light of modern developments in the social and economic structure and of the more recent opinions of this Court. If they are to be held constitutional in proper cases, the lines of demarcation should be established. As now existing, interpreted and enforced (or unenforced) in Ohio they transgress the constitutional limits of the Fourteenth Amendment. The Court should consider the case presented on its merits.

Respectfully submitted,

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## APPENDIX A

THE STATE OF OHIO, APPELLEE, *v.* KIDD, APPELLANT.
THE STATE OF OHIO, APPELLEE, *v.* MILLS, APPELLANT.
THE STATE OF OHIO, APPELLEE, *v.* LEFF, APPELLANT.
THE STATE OF OHIO, APPELLEE, *v.* ULLNER, APPELLANT. (Two cases.)

*Sunday closing law—Section 3773.24, Revised Code, constitutional—"Work of necessity" construed—Classifications of activities prohibited on Sundays—Authority of legislative body to make—Police power.*

1. Section 3773.24, Revised Code, commonly called the Sunday closing law, is a valid, constitutional and enforceable enactment and is not vulnerable to the attack that it is a measure for the enforcement or promulgation of religious observances.
2. "Work of necessity or charity" is exempted from the operation of Section 3773.24, Revised Code. The word, "necessity," is an elastic one, and what constitutes work of necessity is often a question of fact dependent on the circumstances surrounding the particular case.
3. The lawmaking branch of a state government in the exercise of its police power has the constitutional authority to make classifications and selections of those activities which it deems should or should not be prohibited on Sundays, and, so long as those classifications are not arbitrary, capricious or unreasonable and do not discriminate among the same classes or kinds of pursuits, they are valid.

**(Nos. 35215, 35216, 35233, 35317 and 35318—Decided April 30, 1958.)**

APPEALS from the Court of Appeals for Hamilton County.
APPEAL from the Court of Appeals for Cuyahoga County.
APPEALS from the Court of Appeals for Butler County.

In the several causes now here for review the defendants, storekeepers and one clerk, were charged with and convicted in various Municipal Courts of violating Section

*Appendix A*

3773.24, Revised Code, commonly known as the Sunday closing law or blue law, and all the convictions were affirmed on appeal.

Causes Nos. 35215 and 35216 originated in the Cincinnati Municipal Court. Defendant Kidd was a co-owner and operator of a self-serve food market in the city of Cincinnati, and defendant Mills was clerk at the check-out counter in such store. Purchases consisting of groceries, soap, an electric iron and insect spray were made in the store on a Sunday afternoon by police officers, who then advised Kidd and Mills that they were being cited to court—Kidd for opening and conducting a business on Sunday and Mills for engaging in common labor on that day. Affidavits were subsequently filed against the two. The cases were tried concurrently, and some of the evidence introduced is to the effect that the store was located in a neighborhood inhabited and frequented by those who lacked facilities for storing and preserving food.

Cause No. 35233 originated in the Cleveland Municipal Court. Leff, the defendant, was president of the Three Bears Super Stores, Inc., an Ohio corporation, engaged in a number of stores in selling a variety of products. The store here involved was opened on a Sunday, sales of flashlight bulbs were made and prosecution followed.

Causes Nos. 35317 and 35318 had their inception in the Hamilton Municipal Court. One of the affidavits charges the defendant, Ullner, with opening or causing to be opened a building for the transaction of business on Sunday, and the other charges him with requiring a person (his employee) to engage in common labor on Sunday.

Causes Nos. 35215 and 35216 were appealed on questions of law from the Municipal Court to the Court of Appeals for Hamilton County. Cause No. 35233 went from the Municipal Court to the Court of Appeals for Cuyahoga County. Causes Nos. 35317 and 35318 went from the

*Appendix A*

Municipal Court to the Court of Common Pleas of Butler County and from there to the Court of Appeals for that county.

In all causes, the Courts of Appeals affirmed the judgments of the lower courts.

All the causes are now here for disposition on appeals as of right and on the allowance of motions to require the respective Courts of Appeals to certify the records.

*Mr. James W. Farrell, Jr.*, city solicitor, *Mr. Robert J. Paul* and *Mr. Lyle W. Castle*, for appellee in cases Nos. 35215 and 35216.

*Mr. Allen Brown*, for appellants in cases Nos. 35215 and 35216.

*Mr. Ralph S. Locher*, director of law, *Mr. Bernard J. Conway* and *Mr. Edward V. Cain*, for appellee in case No. 35233.

*Messrs. Wyner & Wyner*, for appellant in case No. 35233.

*Mr. Clem M. Imfeld, Jr.*, acting director of law, *Mr. John W. Thomas*, city solicitor, and *Mr. Warren G. Bisdorf*, for appellee in cases Nos. 35317 and 35318.

*Mr. Robert P. Goldman, Mr. Reuven J. Katz, Mr. Edward Pierce, Messrs. Paxton & Seasongood and Messrs. Fitton, Pierce & Black*, for appellant in cases Nos. 35317 and 35318.

ZIMMERMAN, J. All the defendants challenge the constitutionality and validity of Section 3773.24, Revised Code, enacted by the General Assembly in the exercise of its police power. That section, as it is pertinent here, reads as follows:

> "No person who is over 14 years of age shall engage in common labor or open or cause to be opened, a building or place for transaction of business, or require a person in his employ or under his control to engage in common labor on Sunday. . . .

*Appendix A*

> "This section does not apply to work of necessity or charity, and does not extend to persons who conscientiously observe the seventh day of the week as the Sabbath, and abstain thereon from doing things prohibited on Sunday."

It is axiomatic that courts may not inquire into the policy which motivated the enactment of legislation, and as stated in the first paragraph of the syllabus in the case of *State, ex rel. Dickman, a Taxpayer,* v. *Defenbacker, Dir.,* 164 Ohio St. 142, 128 N. E. (2d) 59, "an enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible."

Sunday closing laws have generally been upheld as constitutional and valid against a variety of attacks, such as, that they constitute class legislation, that they are too uncertain, that they violate the constitutional rights of citizens as to equal privileges and immunities, that they violate the right of life, liberty or the pursuit of happiness, and that they violate the constitutional right of freedom of religion. 50 American Jurisprudence, 803, Section 5; and 83 Corpus Juris Secundum, 800, Sunday, Section 3.

Many years ago in a case involving a predecessor statute to present Section 3773.23, Revised Code, Judge Minshall, writing the opinion in the case of *State* v. *Powell,* 58 Ohio St. 324, 340, 50 N. E. 900, 901, 41 L. R. A. 854, made the following observations:

> "The policy of Sunday laws is based upon the observed fact, derived from long experience and the custom of all nations, that periods of rest from ordinary pursuits are requisite to the well-being, morally and physically, of a people. . . . This is the foundation and policy of all statutes regulating the observance of a day of rest; and whether the day selected is one

> consonant to the religious views of a portion of the people or not, does not affect the validity of the regulation, where no religious observance is enjoined."

Section 3773.24, Revised Code, in no way interferes with the freedom of religious worship or the free exercise of religious beliefs, nor was it designed to. As was said by Judge Thurman in the early case of *Bloom* v. *Richards*, 2 Ohio St. 387, 392:

> "Wisdom requires that men should refrain from labor at least one day in seven, and the advantages of having the day of rest fixed, and so fixed as to happen at regularly recurring intervals, are too obvious to be overlooked. It was within the constitutional competency of the General Assembly to require this cessation of labor, and to name the day of rest. It did so by the act referred to, and, in accordance with the feelings of a majority of the people, the Christian Sabbath was very properly selected. But, regarded merely as an exertion of legislative authority, the act would have had neither more nor less validity had any other day been adopted."

Compare *Stanfeal* v. *State*, 78 Ohio St. 24, 84 N. E. 419, 14 Ann. Cas., 138. And see 38 Ohio Jurisprudence 349, Section 10.

It is to be noted that excepted from the operation of the statute in issue is "work of necessity or charity." Obviously, no fixed and unvarying definition of "necessity" as used in the statute can be given. That term is an elastic one. Certainly, it does not mean that which is wholly indispensable, but it does mean something more than that which is merely needful, desirable or convenient. For example, it is hardly a necessity to open a place of business on Sunday to make available to a purchaser an article which in the exercise of reasonable foresight he could have bought on a preceding day. To escape the inhibitions of the statute, labor per-

formed or work done must come within the statutory exceptions, and whether it does is ordinarily a question of fact largely dependent on the circumstances surrounding the particular case. In the cases before us, all the lower courts determined that the element of necessity was lacking and we find no sufficient reason for overturning those determinations.

Another argument made is that Section 3773.24, Revised Code, is unconstitutional because it is a law for the promulgation of religious beliefs. True, that section by its terms is not applicable to "persons who conscientiously observe the seventh day of the week as the Sabbath, *and abstain thereon from doing things prohibited on Sunday.*" However, the evidence in these cases under consideration does not disclose that the business places involved closed on *any* day of the week in the observance of a religious belief or for any other reason, and, therefore, the defendants are hardly in a position to attack the statute on the constitutional grounds asserted. *Humphrey Chevrolet, Inc.* v. *City of Evanston*, 7 Ill. (2d) 402, 131 N. E. (2d) 70; *State* v. *Grabinski*, 33 Wash. (2d) 603, 206 P. (2d) 1022. But to face the problem squarely, we entertain the view, in line with former decisions of this court already referred to and with those of other courts which have interpreted statutes similar to Section 3773.24, Revised Code, that such section does not represent a measure to enforce or promulgate religious observances.

The further argument is made that Section 3773.24, Revised Code, has been so undermined by exceptions that it is no longer sustainable. Our attention is directed to the laws which permit the sale of intoxicating liquors until 2:30 a. m. on Sundays and the sale of beer on that day having an alcoholic content of no more than 3.2 per cent, to those which sanction the playing of baseball games and the exhibition of motion pictures after noon on Sundays, to those

which sanction trapshooting on Sunday afternoons when conducted under the auspices of a recognized club, and to others which sanction Sunday activities of a secular nature. It is claimed that these exceptions operate in such a discriminatory way as to nullify Section 3773.24, Revised Code, and that such section constitutes a denial of the equal protection of the laws and represents class legislation.

Contentions of that sort are not new and have frequently been rejected. Sunday observance laws are in force in most of the states, and generally certain activities have been excepted from their coverage. These Sunday laws are sustained quite uniformly upon the theory that the selection of subjects for exemption is peculiarly a matter of legislative discretion. Fundamentally, discrimination is the very essence of classification and is not objectionable unless founded on distinctions which the courts are compelled to pronounce unreasonable or purely fictitious.

The holdings of probably a majority of the courts are that the lawmaking department of a state has the constitutional power to make classifications and selections of what should or should not be prohibited on Sunday, so long as those classifications are not arbitrary, capricious or unreasonable and so long as they do not discriminate among the same classes or kinds of pursuits. See annotations, 46 A. L. R. 290, and 119 A. L. R. 752. For its reasoning, attention is directed to the case of *Gundaker Central Motors, Inc.* v. *Gassert, Jr., Dir.*, 23 N. J. 71, 127 A. (2d) 566 (appeal dismissed for want of a substantial federal question, 354 U. S. 933, 1 L. Ed. [2d] 1533, 77 S. Ct. 1397). If, for instance, a law enforcement agency should invoke Section 3773.23, Revised Code, with respect to a football game played after noon on Sunday, the legality of such action might well be challenged, in face of the statute which permits Sunday baseball. See *Carr* v. *State*, 175 Ind. 241, 93 N. E. 1071, 32 L. R. A. (N. S.) 1190, holding the exemption

of the game of baseball from the Sunday law a valid enactment, and see annotation, 24 A. L. R. (2d) 813. At least one court has held that engaging in a sport, specifically baseball, does not constitute "labor" within the prohibition of a Sunday law. *Territory of New Mexico* v. *Davenport*, 17 N. M. 214, 124 P. 795, 41 L. R. A. (N. S.) 407.

Some of the defendants place reliance on the cases of *Olds* v. *Klotz*, 131 Ohio St. 447, 3 N. E. (2d) 371, and *City of Cincinnati* v. *Correll*, 141 Ohio St. 535, 543, 49 N. E. (2d) 412, both of which had to do with municipal ordinances as distinguished from state laws. The ordinances involved in the cited cases fixed the hours on week days during which lawful business establishments might remain open, and this court held such ordinances to be unreasonable, arbitrary and discriminatory because they were opposed to basic freedoms and rights constitutionally guaranteed and constituted an unauthorized exercise of the police power, since they bore no real and substantial relation to the health, safety, morals or general welfare of the public.

In keeping with the above holdings, it is generally recognized that a municipality in the exercise of its police power may not impose limitations, burdens and restrictions which impair the right to conduct lawful businesses, where the elements of public health, morals or safety are lacking.

In contrast, Section 34, Article II of the Constitution of Ohio, reads:

> "Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the Constitution shall impair or limit this power."

Section 3773.24, Revised Code, is an enactment adopted by the General Assembly, is operative throughout the entire state and sets aside a specifically designated day of each week for the cessation of secular activities. Independent

of the quoted constitutional provision, wisdom and common experience have long demonstrated that one full day of rest in seven is essential to the well being of all individuals, and that its observance does have a vital bearing on the health, safety, morals and general welfare of the citizenry.

We think the *Klotz* and *Correll* cases are clearly distinguishable from the instant ones, and that those cases are in no way decisive here.

As a part of his inaugural address delivered on March 4, 1869, President Ulysses S. Grant said:

> "I know no method to secure the repeal of bad or obnoxious laws so effective as their stringent enforcement."

Whether in this fast-moving modern age the Sunday closing law is outmoded, obsolete and unrealistic and should be eradicated is essentially a legislative and not a judicial problem. Of course, the recognition and enforcement of the law depend largely upon the sentiment in a locality and the attitude of the law enforcement agencies of that community. But the fact remains that, even though such law may be inappropriate to existing conditions, it is on the statute books as a living piece of legislation, and there are many who would strenuously oppose its repeal. See *State* v. *Cranston*, 59 Idaho 561, 85 P. (2d) 682.

Various counsel attack the legality of the convictions of the defendants on other grounds, including the claim that the evidence adduced is insufficient to sustain the convictions. We have examined these contentions and find them without substantial merit.

In our opinion, no good or adequate reasons are discernible for reversing the judgments of the Courts of Appeals in the several causes under review, and they are, accordingly, affirmed.

*Judgments affirmed.*

*Appendix A*

WEYGANDT, C. J., STEWART, TAFT, MATTHIAS, BELL and HERBERT, JJ., concur.

TAFT, J., concurring. In my opinion, the strongest arguments, advanced in these cases against validity of the Sunday closing law, were those based upon the decisions of this court in *Olds* v. *Klotz*, 131 Ohio St., 447, 3 N. E. (2d) 371, and *City of Cincinnati* v. *Correll*, 141 Ohio St., 535, 49 N. E. (2d) 412. To paraphrase what was said by Bell, J., in his opinion in the latter case (page 542), almost every statement made in declaring invalid the legislation involved in those cases would be equally applicable in declaring the Sunday closing law invalid.

The legislation in the *Klotz* case made "it unlawful to maintain and operate a retail food and grocery establishment, open to the public for business except as between the hours of 7 a. m. and 7:30 p. m. on Monday, Tuesday, Wednesday, Thursday and Friday" but did permit operations from 7 a. m. to 9 p. m. on Saturdays and any day preceding a holiday (131 Ohio St., 450). The legislation in the *Correll* case made "it unlawful . . . to permit a barber shop to be open for . . . business . . . other than upon the days of the week and the hours of the day set forth" which were quite similar to those specified in the *Klotz* legislation.

It may be argued that Section 34 of Article II of the Ohio Constitution, which states that "laws may be passed fixing and regulating the hours of labor," will support the Sunday closing law although it would not support the ordinances involved in the *Klotz* and *Correll* cases. See dissenting opinion of Jones J., in *Wilson* v. *City of Zanesville*, 130 Ohio St., 286, 199 N. E., 187. However, paragraph one of the syllabus in the *Klotz* case specifically states that the ordinance there involved was "not a valid exercise of the police power" and was "in contravention of the due process clause of the Fourteenth Amendment to the federal

Constitution." Hence, this distinction of the *Klotz* case cannot be adopted without overruling in part paragraph one of its syllabus. Also, the decision in the *Correll* case, when read in the light of its syllabus, clearly indicates a conclusion by the majority of the court in that case that the legislation there involved was invalid because it bore no "real and substantial relation to the health, safety, morals or general welfare of the public."

Legislation, requiring the closing of a "place for transaction of business" during the daytime, as does the Sunday closing law, would quite clearly appear to have a less "real" or "substantial relation to the health, safety, morals or general welfare of the public" than would legislation requiring such a closing during the nighttime, as did the ordinances in the *Klotz* and *Correll* cases.

However, probably the real distinction between the holdings of this court in the *Klotz* and *Correll* cases and its holdings in the instant cases is the extent of the "closing" required by the ordinances involved in those cases as compared with the extent of the closing required under the Sunday closing law. Under those ordinances, the establishments involved had to be closed not only on Sunday, as under the Sunday closing law, but also during a very substantial number of the hours of each of the other days of the week. In other words, the ordinances went much farther in providing for what is referred to in the quotation in the majority opinion from Minshall, J., as "periods of rest" than did the Sunday closing law. Thus, although a legislative provision for "periods of rest" may have some "real and substantial relation to the health, safety, morals or general welfare of the public" and hence represent a valid exercise of the police power, there are limitations beyond which it cannot go in providing for such "periods of rest" without becoming unreasonable and hence an invalid exercise of the police power.

## APPENDIX B

IN THE COURT OF APPEALS,
FIRST APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

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**Nos. 1081, 1082**

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STATE OF OHIO,

*Plaintiff-Appellee,*

v.

COLEMAN ULLNER,

*Defendant-Appellant.*

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**OPINION**

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(April 27, 1957)

**APPEALS ON QUESTIONS OF LAW,
FROM COURT OF COMMON PLEAS,
BUTLER COUNTY, OHIO.**

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Mr. John W. Thomas, Hamilton, Ohio, for Plaintiff-Appellee.

Messrs. Paxton & Seasongood, Mr. Robert P. Goldman and Mr. Reuven J. Katz, Cincinnati, Ohio, and Mr. Edwin B. Pierce, Hamilton, Ohio, for Defendant-Appellant.

Matthews, J.

These two appeals from judgments of affirmance by the Court of Common Pleas of convictions of the appellants

by the Municipal Court of the City of Hamilton, Ohio, for violation of Section 3773.24, Revised Code, are considered together.

There were two affidavits filed against the defendants. In one, he was charged with unlawfully opening or causing to be opened a building or place for the transaction of business on a designated Sunday. In the other affidavit, he was charged with requiring a person in his employ, or under his control, to engage in common labor on a designated Sunday.

The first error assigned is, that the complaint fails to allege knowledge or intent to violate the law and, therefore, fails to charge an offense. *Daugherty* v. *Village of Dennison*, 11 C. C. (N. S.) 13, and *Goldsmith* v. *State*, 13 C. C. (N. S.) 148, and *City of Toledo* v. *Kohlhofer*, 96 Ohio App. 355, are cited in support of that contention. As to the first two cases, we think it sufficient to say that they were decided long prior to the enactment of the Code of Criminal Procedure Act, of which Section 2941.05, Revised Code, is a part, which expressly provides that it is sufficient for an information or indictment to be in the words of the statute defining the offense. The affidavits in these cases answer that test. As to the last case (Kohlhofer) we find it entirely dissimilar. To start with, in that case, unlike the affidavit in these cases, there was no averment that the act had been done unlawfully. Next, the character of the act was equivocal, per se. It could be done lawfully. It became unlawful only when done knowingly and with purpose or intent. In the cases at bar, the acts could not be done within the law, no matter what the purpose, except in the instances set forth in the statute itself.

Next, it is urged that there is a failure of proof that the defendant-appellant opened the place for the transaction of business in the one instance, and in the other instance required the employee to perform common labor

on Sunday. As this contention required a consideration of the evidence, we have read the bill of exceptions and have concluded that this contention is without merit.

The evidence shows that on the Sunday in question, what seems to have been a rather large business establishment was being openly and actively operated. There was a corps of clerks serving many customers. It is not denied that the business was being operated and that it violated the terms of Section 3773.24, Revised Code. But, it is asserted that there is a failure of proof as to who was there at the beginning of business on that Sunday, and who employed those engaged and required the employees to perform the labor on that Sunday.

It seems to us that this dilemma is more apparent than real.

The evidence shows that this store was being operated by a family corporation. There were only three stockholders—two brothers and a sister,—and all were actively engaged in this business. These three, either in person or through their agents, did these things. The defendant was present in the store at the time.

When we consider that those engaged in a common enterprise are each responsible for the acts of one another in pursuance of the common enterprise, and we further consider that under the law of Ohio (Sec. 1.17, R. C.) aiders and abettors are criminally liable and may be charged as principals, the speciousness of the contention is made manifest.

Finally, the broad contention is made that Section 3773.24, Revised Code, infringes freedom of religion and, therefore, violates both the State and Federal constitutions. It is said that recent decisions of the Supreme Court of the United States have broadened the "due process" clause of the XIV Amendment of the United States Constitution, so that it now includes all of the first ten amendments of

that instrument as limitations upon the power of the states, and that this requires a reconsideration and re-appraisal of these Ohio cases sustaining this law (*State* v. *Powell*, 58 Ohio St., 324, et al.) in the light of these later decisions of the Supreme Court of the United States.

We fail to see the necessity for this re-appraisal. During the entire life of the State of Ohio, its Constitution has withheld from the legislature the power to pass any law that established any religion or prevented any person from worshipping his God according to the dictates of his own conscience. Placing a double guard—federal as well as state, if such is the case—neither strengthens or weakens the prohibition.

Whether we consider the question in relation to the State constitution or the Federal constitution, or both, it remains the same, and that is, whether designating Sunday as the day of rest is a violation of the freedom of religion guaranteed by the constitution, or any other constitutional right.

That a State in the exercise of its police power has a right to make some regulation of work and rest is conceded. That such a power exists has been recognized since the beginning of history. And in our Country, we say it is a part of that power to make all manner of laws having a reasonable relation to the health, morals, safety, general welfare and general prosperity. They are just objects of government and so long as the specific law has a reasonable relation to one or more of those objects, and operates uniformly on all similarly situated, whether the law shall be enacted is a matter of policy for the legislature to determine, and with which the courts are not concerned. And no constitutional limitation restricts the exercise of such power. This law was passed in the exercise of that power and the exception to the general prohibition cannot be said to have no reasonable basis.

*Appendix B*

But it is said that while requiring the observance of one day out of seven as a day of rest is a valid exercise of the police power, that power does not authorize the fixing of a specific day of the week as a day of rest, particularly when the specific day happens to be the day designated by the religion of the majority of the citizens as a day of rest, such as the Christian Sabbath. It is difficult—we think impossible—to make even a convincing argument that such a law has any relation whatsoever to religion, that is, anything to do with man's relation to his God. It requires nothing. It imposes nothing. It dictates nothing. It leaves him completely free to choose his religion and practice it without let or hindrance.

If designating a specific week day as the day of rest is beyond the power of the legislature, it must be for some other reason. We do not think that the legislature is required to assign a reason for fixing a specific day, rather than leaving it to individual choice. We think valid reasons could be stated. In passing legislation, it is a proper object to consider the ease or difficulty of enforcement. Now, certainly the power to enforce the observance of a specific day of rest would be much easier than to enforce a day of rest selected by the individual. It would seem that the latter would not only be difficult, but in fact impossible to enforce. And that fact that a large group is already observing a specific day would be a proper thing to consider, and the selection of that day for that reason would not interfere with any one's freedom of religion.

For these reasons, the judgments are affirmed.

HILDEBRANT, P. J., & LONG, J., Concur.

## APPENDIX C

STATE OF OHIO, BUTLER COUNTY
COURT OF COMMON PLEAS

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**No. 72917**

THE STATE OF OHIO,

*Plaintiff-Appellee,*

v.

COLEMAN ULLNER,

*Defendant-Appellant.*

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**No. 72918**

THE STATE OF OHIO,

*Plaintiff-Appellee,*

v.

COLEMAN ULLNER,

*Defendant-Appellant.*

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**OPINION**

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(October 29, 1956)

BOLI, J.

These two cases are before this Court upon appeal from the Municipal Court of Hamilton wherein in one case the defendant was found guilty of unlawfully opening a building for the transaction of business on Sunday and in the other case, was found guilty of unlawfully requiring employees to labor on Sunday. The defendant offered no evidence and there is no dispute as to the facts.

*Appendix D*

Practically all the questions of law raised by counsel for defendant have been disposed of by various former Court of Appeals and Supreme Court decisions.

The Constitutional questions have been passed on by our Supreme Court in several cases and we do not deem it fitting to attempt to overrule that Court.

We also have had the benefits of reading the trial Court's opinion which, in our judgment, well states the Ohio law on all of the points in question.

Because of this, we find no error prejudicial to the defendant and both judgments will be affirmed.

**APPENDIX D**

MUNICIPAL COURT
CITY OF HAMILTON
BUTLER COUNTY, OHIO

---

**Case Numbers 73473, 73474, and 73475**

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**OPINION**

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THE STATE OF OHIO,

*Plaintiff,*

v.

HI-CODE TRADING CORPORATION (1 Case),
and
COLEMAN ULLNER (2 Cases),

*Defendant.*

---

WESSEL, J. The Court has before it two charges against Coleman Ullner, one for unlawfully opening a building for the transaction of business on Sunday, the other for unlaw-

fully requiring employees to labor on Sunday. The Third case is against the Hi-Code Trading Corporation, which also charges unlawful opening of a building for the transaction of business on Sunday. Before the Court can dispose of the case, it is necessary to dispose of numerous motions which have been offered asking the Court to dismiss the cases for various reasons. The Court believes that most of these reasons are disposed of in the case of *State* v. *Haase* as found in 97 Oh. Ap. at page 377. Council for the defendant in this case questioned the constitutionality of the act. The court in that decision said:

> "We conclude, therefore, that section 3773.24 of the Revised Code is not in conflict with any of the provisions of either the Federal or State Constitutions."

Practically all of the objections raised in this case had been raised in the case herein cited, including the fact that a number of other businesses were operating on the same Sunday on which a violation is charged to the defendant. The Court in the *Haase* case says:

> "It is to be noted that except for attending the means of public travel and engaging in sports or other forms of public entertainment or recreation, the only permissible Sunday business activities are works of necessity and charity. The statutes of Ohio, therefore, do not permit some businesses to operate on Sunday and deny the same right to others of like character and the decisions holding Sunday closing laws unconstitutional because they permit some businesses to operate on Sunday and deny the same right to others are not applicable."

The Court in the *Haase* case also says:

> "These cases are collected in a comprehensive note in 46 A. L. R. 290 (see paragraph II, page 292). The purpose of Sunday closing laws being in the interest

> of the public welfare, and in support of the religious and devotional life of the community, providing for a day of rest and possibly recreation, must be liberally construed in favor of their validity and as being within the constitutional powers of the Legislature."

That Court also quotes 38 Oh. Jur., 349, Section 9, in which the author says:

> "Laws relating to the observance of Sunday have been uniformly recognized as a legitimate exercise of the police power. These laws, fixing regularly running days of rest for all secular pursuits, are within the power of the Legislature to adopt such wholesome regulations as may be necessary to promote the peace, health, and well-being of society. In fact, the state may, as a police regulation for the promotion of the physical, mental, and moral welfare of its citizens, establish as a civil and political institution the first day of the week as a day of rest and prohibit the performance upon it of all labor or business except works of necessity or charity. Accordingly, Sunday legislation, including both statutes and ordinances, prohibiting common labor, barbering, baseball, hunting, etc., on Sundays, has been upheld."

The constitutionality of Ohio laws passed in the interest of the observance of Sunday as a day of rest, has been upheld by the Supreme Court in a number of cases. The *Haase* case holds that a hardware business is not a work of necessity. The Court believes the same is true of the business operated by the defendant known as Rink's Bargain City.

The Court in the *Haase* case, therefore, concluded that section 3773.24 of the Revised Code is not in conflict with any of the provisions of either the Federal or State Constitution.

In this case, the defendant proffered the testimony of a long list of businesses which were in operation on the day

this violation occurred which evidence was rejected by the Court. That same situation occurred in the *Haase* case, and in that case, the Court said:

> "The claim of error in rejecting evidence as to probable violation of the Sunday closing laws by others, who were not prosecuted by the authorities, thereby depriving defendant of equal protection under the law, is not well taken."

From the record and the proffered evidence in this case, it is probable that many violations of the Sunday closing laws are not challenged by the enforcement agencies of the City of Hamilton. It was claimed in argument that the provisions of the law in many respects seem not to fit into the pattern of modern living. It will come as a surprise to many ardent fishermen that the law prohibits them from enjoying such recreation on Sunday. No one, however, need come to the defense of the need for Sunday closing laws. In proper form they speak the will of the people. They have had a long history of supporting the public will that Sunday should be devoted to rest and religious devotion. Such laws are to be found in the history of legislation almost from the beginning of modern civilization, finding their support no doubt from the Third Commandment, "Remember that thou keep holy the Sabbath Day."

The Court in that case quotes 83 Corpus Juris Secundum, 800, Subdivision II, regarding the regulation and enforcement of Sunday observance under the heading of "General History," and we find the following:

> "The observance of Sunday is recognized by Constitutions and legislative enactments, both state and federal, and Sunday prohibitory laws are said to have been enacted in all the states. Such laws are said to have a religious or divine origin.
>
> "Sunday legislation is more than fifteen centuries old; it originated in Rome in A. D. 321, when Constantine

*Appendix D*

> the Great passed an edict commanding all judges and inhabitants of cities to rest on the venerable day of the Sun. Sunday statutes were passed at an early date in England and 29 Charles II c 7 has been made the basis of similar legislation in many of the states. . . ."

It might be said that a greater acceptance by the people of the fundamental purpose of these statutes would help in solving many of our difficult social problems. The Court says in the *Haase* case:

> "Courageous leadership in bringing about a greater understanding of their value would indeed be most beneficial.
>
> "But these are matters which come exclusively within the jurisdiction of law enforcing officers, legislative bodies and educational leaders. Courts must impartially interpret the law in cases commenced within their respective jurisdictions. The fact that one person is prosecuted and another is not is a subject with which the court cannot deal."

Also in that case, the Court quoted a decision of a Vermont case in which in dealing with the same question, that Court said:

> "If so, it was a discrimination in the administration of the law and not in the law itself, and manifestly had no bearing on the question of respondents' guilt or innocence. One offender cannot excuse his conduct by showing that someone else equally guilty has not been prosecuted."

In the *Haase* case, the Court said:

> "We find no error in excluding such evidence."

Counsel for the defendant makes much of the fact that no where in the affidavit is the defendant charged with

knowledge and criminal intent. In the case of the *City of Toledo* v. *Kohlhofer*, 96 Oh. Ap. p. 355, in which several other cases are cited in which they claim held that an affidavit charging violation of an ordinance and omitting therefrom the elements of knowledge and intent is insufficient to charge the offense. It seems to the Court that the facts in that case are distinctly different from the facts in the case at bar. In that case, the defendants were charged with the sale of contraceptive devices which had both a legal and illegal use, and which in the opinion of the Court, knowledge and intent was a necessary averment. However, in this case, the Court believes that knowledge and intent are not necessary, not being a part of the law itself and the case failing within the class of cases in which criminal intent is not a necessary element. Referring to this same case cited by the counsel for the defense, the Court said, quoting *Morissette* v. *United States* (1952), 342 U. S., 246, 96 L. Ed. 288, 72 S. Ct., 240, in which there appears an exhaustive review of the origin and development of case law holding that proof of knowledge and intent in certain regulatory statutes in aid of the police power is not essential. And they say the doctrine of crime without intent is roughly classified into eight divisions, and the eighth division therein set out is violations of general regulations, passed for the safety, health or well-being of the community.

In the instant case, we have all ready shown that the Courts have regarded the Sunday closing law as a valid police regulation in the interest of health, safety or betterment of the community. So we believe the Sunday closing law is one of those cases in which criminal intent is not a necessary element of the offense, and that ground of the motion is hereby overruled.

One of the distinctions in the Ohio case cited by counsel for the defense is that the ordinance for the violation of

which the defendant in that case was cited was patterned after a state law at a time when the state law did not require knowledge. It seems that at the time of the arrest, the state law had been changed to include the word knowledge, but that the city ordinance was not so amended. This we believe constitutes a rather marked distinction between the case cited by the counsel and the case at bar.

Counsel also in his brief makes much of the right to freedom, of protection of property, and of rights of conscience, education, necessity of religion, and claims that the law is unconstitutional because it fails to provide for those sects who might observe some day other than Sunday or the seventh day, and mentioned incidentally, Mohammedans and all that, but the Court in the *Haase* case, and I think, rightfully so, holds that those are matters of defense and counsel in the instant case, readily admitted that the defendant is not of Mohammedan extraction or a member of one of the other sects which claim some day other than Sunday or the seventh day as the day on which to rest.

In the *Haase* case, the Court said, quoting the case of *Strenglien* v. *State*, 17 Oh. St. at p. 453, at page 461. The Court quoted from one 1 Wharton's American Criminal Law, Section 378, as follows:

> "'If provisos and exceptions are contained in distinct clauses, it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the provisos it contains.' 'For all these are matters of defense, which the prosecutor need not anticipate, but which are more properly to come from the prisoner.'"

There is no doubt in the mind of the Court that conducting a general merchandise business on Sunday, such as Rink's Bargain City, does not come within the exception of "necessity" under the saving clause of the statute any

more than would be true of carrying on a general business of any kind.

The Court in the *Haase* case says, of course, these businesses are very necessary as part of our economy and social requirements, but this is not the meaning of the words, "work of necessity or charity," as used in section 3773.24 Revised Code. People can by ordinary foresight provide themselves with whatever goods seem convenient or necessary for their needs on days of the week other than Sunday. To provide against such business transactions on Sunday was the very purpose of the law.

Counsel for the defendant also stressed the fact that the law limiting to six the number of days which minors and females may be employed without limitation as to which days are suspended to September 1st, 1955. The Court believes this has no application in the instant case inasmuch as Sunday closing laws are not mentioned in that section and consequently are not effected by that legislation.

The situation is somewhat complicated as to the charge against the Hi-Code Trading Corporation by the interlocking of corporations as appears from the testimony in this case. It appears that the officers of both corporations are the same, that the Hi-Code Trading Corporation executed a lease of the premises to the Famous Surplus Sales which it is claimed is operating the business at Rink's Bargain City. However, the lease in question, having expired apparently at the end of the period for which it was given and no further corporate action on the part of either corporation in leasing the premises to itself appears anywhere in the minutes, so that the Court is left with the impression that it made little difference whether the lease was renewed or not, because all of the folks involved are the same folks regardless of which way it went. The testimony, however, indicates that Rink's Bargain City is still being operated by Famous Surplus Sales, although Hi-Code

Trading Corporation owns the premises, and under what arrangement, the Court does not know. However, the Court feels that proof beyond a reasonable doubt against the Hi-Code Trading Corporation has not been made out, and that case will be dismissed.

One other point has been raised by counsel for the defendant, and that is that the State failed to prove that the defendant is a person over the age of fourteen years. However, the Court believes there is ample evidence in the case to infer and which proves beyond a reasonable doubt that the defendant is a person over fourteen years of age. One fact is that he executed a lease of the premises to the Famous Surplus Corporation and accepted the lease as President of the other corporation, and it seems to the Court that only a person of full age would accept such an instrument as valid on its face. If the Court is to infer it was executed by a person under fourteen years of age, certainly the lease has no effect on the decision.

With all these facts in mind, the Court finds the defendant, Coleman Ullner, guilty as charged in the two affidavits. The sentence of the Court is that he be fined twenty-five dollars ($25.00) and costs in each case.

## APPENDIX E

### Judgment Entries in the Supreme Court of Ohio

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO
CITY OF COLUMBUS

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**No. 35317**

---

January Term, A.D. 1958
To-wit: Wednesday, April 30, 1958

STATE OF OHIO,

*Appellee,*

v.

COLEMAN ULLNER,

*Appellant.*

---

**Appeal from the Court of Appeals of Butler County**

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This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Butler County, and was argued by Counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended taxed at $———.

*Appendix F*

ORDERED, That a special mandate be sent to the Court of Common Pleas of Butler County, to carry this Judgment into Execution.

ORDERED, That a copy of this entry be certified to the Clerk of the Court of Appeals, of Butler County, "for entry."

(The judgment entry was identical in case No. 35318.)

## APPENDIX F

### Entries of the Supreme Court of Ohio Denying Application for Rehearing

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO
CITY OF COLUMBUS

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**No. 35317**

---

January Term, A.D. 1958
To-wit: May 21, 1958

STATE OF OHIO,

*Appellee,*

v.

COLEMAN ULLNER,

*Appellant.*

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**Rehearing Docket**

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Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

(The entry was identical in case No. 35318.)

## APPENDIX G

[SUNDAY PROHIBITIONS]

§ 3773.23 Sunday prohibitions. (GC § 13049)

No person shall, on Sunday, participate in or exhibit to the public with or without charge for admittance in a building, room, ground, garden, or other place, a theatrical or dramatic performance or an equestrian or circus performance of jugglers, acrobats, rope dancing, or sparring exhibition, variety show, negro minstrelsy, living statuary, ballooning, baseball playing in the forenoon or exhibition of motion pictures in the forenoon. No person shall participate in keeping a low or disorderly house or resort, or sell, dispose of, or give away ale, beer, porter, or spirituous liquor in a building appendant or adjacent thereto, where such show, performance, or exhibition is given, or house or place is kept. Complaint must be filed under this section within twenty days after a violation thereof.

§ 3773.25 Hunting or fishing on Sunday. (GC § 13048)

No person over fourteen years of age shall engage in sporting, rioting, quarreling, hunting, fishing or shooting on Sunday. Complaint must be filed under this section within ten days after a violation thereof.

§ 3773.26 Prohibition against having hunting implements on Sunday; exception. (GC § 13053)

No person shall, in the open air on Sunday, have implements for hunting or shooting with intention to use them for that purpose. The use of hunting implements in trap shooting on Sunday afternoons when conducted under the auspices of a recognized hunt, trap shooting, rifle or game club of this state, is permitted.

§ 3773.99 . . .

(O) Whoever violates section 3773.23 of the Revised Code shall be fined not more than one hundred dollars or imprisoned not more than six months, or both.

(P) Whoever violates section 3773.24 of the Revised Code shall be fined twenty-five dollars for a first offense; for each subsequent offense such person shall

be fined not less than fifty nor more than one hundred dollars and imprisoned not less than five nor more than thirty days.

(Q) Whoever violates section 3773.25 of the Revised Code shall be fined not more than twenty dollars or imprisoned not more than twenty days, or both.

(R) Whoever violates section 3773.26 of the Revised Code shall be fined not less than twenty-five nor more than two hundred dollars.

§ 4107.46 Total hours and days of employment.

(A) No employer shall employ a female for more than forty-eight hours in any one week or eight hours in any one day, or on more than six days in a calendar week, except that:

(1) In manufacturing establishments a female may not be employed more than forty-eight hours in any one week or nine hours in any day, or on more than six days in a calendar week;

(2) A female over eighteen years of age working in an office may be employed ten hours on any one day of the calendar week, provided that such ten hours shall fall within twelve consecutive hours;

(3) In mercantile establishments a female over eighteen years of age may be employed ten hours on any one day of the calendar week, and for ten hours on the days preceding the thirtieth day of May, known as Decoration or Memorial day, the fourth of July, known as Independence day, the days designated by proclamation as Thanksgiving day, the twenty-fifth of December, known as Christmas, and the first of January, known as New Year's day; and not to exceed eight hours on any other day;

(4) In any one week during the first six months of the year, and in any two weeks during the last six months of the year, a female employed in mercantile establishments may work not to exceed ten hours in any one day and fifty hours in the week so selected;

(5) In laundry and dry cleaning establishments a female shall be permitted to work nine hours per day any two days of the calendar week providing the regu-

lar work week is not in excess of forty-eight hours, except that a total of fifty hours may be worked in the week immediately preceding or during the week in which is included one of the following: New Year's day, Good Friday, Memorial day, Fourth of July, Labor day, Thanksgiving day, and Christmas day;

(6) The employment of a female in excess of eight hours, but not to exceed nine hours in any one day, shall be permitted in cases not otherwise covered in this section, in sections 4107.43, 4107.47, and 4109.10 to 4109.23, inclusive, of the Revised Code, provided that no extension of the maximum hours per week or days per week shall be authorized.

(B) If the work during any one day is not continuous but is divided into two or more periods, the employer shall provide that all such periods fall within ten consecutive hours, except that:

(1) In the case of hospitals organized and operated not for profit all such periods shall fall within twelve consecutive hours;

(2) For employees engaged in the operation of a communications company all such periods shall fall within thirteen consecutive hours;

(3) In hotels and restaurants all such periods shall fall within twelve consecutive hours;

(4) In mercantile establishments all such periods shall fall within twelve hours on the day a ten hour work day is permitted.

(C) A female may be employed in more than one place of employment provided the aggregate number of hours such female is employed does not exceed eight in any one day or forty-eight in any one week.

(D) Sections 4107.42, 4107.45 to 4107.53, inclusive, and 4109.22 of the Revised Code do not apply to:

(1) The employment of females in agricultural field occupations or in domestic service in private homes;

(2) The employment of females by a public utility company, any carrier subject to part I of the Interstate Commerce Act, or a communications company, during periods of emergency caused by fire, flood, epidemic, or other public disaster;

(3) The work of females over twenty-one years of age earning at least forty-five dollars a week in bona fide executive, professional, supervisory, or administrative positions where the duties of such require the exercise of discretion;

(4) The employment of women in the professions of medicine, registered nursing as defined in section 4723.06 of the Revised Code, pharmacy, law, teaching, and social work;

(5) The employment of females over twenty-one years of age in mercantile establishments and communications companies except in cities;

(6) The work of professional employees in hospitals, such as graduate and student nurses, anesthetists, technicians, graduate and student dietitians, and internes; provided that no restrictions as to hours of labor of females over twenty-one years of age shall apply to canneries or establishments engaged in preparing for use agricultural or horticultural perishable foods during the growers' harvest season when they are engaged in canning the farmers' perishable products.

(E) No employer shall employ a female for a period of more than five hours of continuous labor unless such period is broken by a meal period of at least one-half hour. For the purpose of this section no period of less than thirty minutes shall be deemed to interrupt a continuous period of work; provided that a female over twenty-one years of age employed by a public transportation company to operate street cars, trackless trolleys, or motor coaches shall be permitted to work and operate such vehicles for the same hours and periods as are permitted by law for male workers engaged in the same kind of employment but not in excess of forty-eight hours in any one week.

§ 4109.22 Employment of minors; hours per day and days per week; exceptions.

(A) No boy under eighteen shall be employed, permitted, or suffered to work in, about, or in connection with any establishment or occupation named in section 4109.10 of the Revised Code:

*Appendix G*

(1) For more than six days in any calendar week;
(2) For more than forty-eight hours in any calendar week;
(3) For more than eight hours in any one day;
(4) Before six a.m. or after ten p.m.

(B) No girl under eighteen shall be employed, permitted, or suffered to work in, about, or in connection with any establishment or occupation named in section 4109.10 of the Revised Code:

(1) For more than six days in any calendar week;
(2) For more than forty-eight hours in any calendar week;
(3) For more than eight hours in any one day;
(4) Before seven a.m. or after nine p.m.; except that:

(a) In mercantile establishments minors sixteen to eighteen may be employed for ten hours on any one day of the week and also on the days specified in section 4107.46 of the Revised Code on which females may be employed ten hours in mercantile establishments;

(b) In mercantile establishments a girl sixteen to eighteen may be employed two evenings in a calendar week until nine-thirty p.m.

(C) No minor under sixteen shall be employed, permitted, or suffered to work in, about, or in connection with any establishment or occupation named in section 4109.10 of the Revised Code before seven a.m. or after six p.m.; except that: (1) In bowling centers a boy over sixteen may be employed as a pinsetter until eleven p.m.

(D) The presence of such child in any establishment during working hours is prima facie evidence of its employment therein. In estimating such periods the time spent at different employments or under different employers shall be considered as a whole and not separately.

(E) No restrictions as to hours of labor of persons sixteen or over shall apply to canneries or establishments engaged in preparing for use agricultural or

incorporation of the proposed Authority will be filed with the Secretary of the Commonwealth of Pennsylvania. No such municipality shall be required (any law to the contrary notwithstanding) to make any other publication of such resolution or ordinances under the provisions of existing law. The aforesaid publication of such notice shall be sufficient compliance with such laws.

B. On or before the day specified in said notice the municipal authorities shall file with the Secretary of the Commonwealth articles of incorporation together with proof of publication of the notice as aforesaid. Said articles of incorporation shall set forth:

(a) The name of the "Authority."

(b) A statement that such Authority is formed under this act.

(c) A statement whether any other Authority has been organized under this act or under the act, approved the twenty-eighth day of June, one thousand nine hundred thirty-five (Pamphlet Laws 463), and is in existence in or for the incorporating municipality or municipalities, except that where any one or more of the municipalities have already joined with other municipalities not composing the same group in organizing a joint Authority, the application shall set forth the name of the Authority theretofore created, together with the names of the municipalities joining therein.

(d) The name of the incorporating municipality or municipalities, together with the names and addresses of its municipal authorities, and

(e) The names, addresses and term of office of the first members of the board of said Authority.

All of which matter shall be determined in accordance with the provisions of this act. Said articles of incorporation shall be executed by each incorporating municipality by its proper officers and under its municipal seal.

C. If the Secretary of the Commonwealth finds that the articles of incorporation conform to law, he shall forthwith, but not prior to the day specified in the aforesaid notice, endorse his approval thereon, and when all proper fees and charges have been paid, shall file the articles and issue a certificate of incorporation, to which shall be attached a copy of the approved articles. Upon the issuance of such certificate of incorporation by the Secretary of the Commonwealth, the corporate existence of said Authority shall begin. Said certificate of incorporation shall be conclusive evidence of the fact that such Authority has been incorporated, but proceedings may be instituted by the Commonwealth to dissolve any Authority which shall have been formed without substantial compliance with the provisions of this section.

D. When the Authority has been organized and its officers elected, the secretary shall certify to the Secretary of the Commonwealth the names and addresses of its officers, as well as the principal office of the Authority. Any change in the location of the principal office shall likewise be certified to the Secretary of the Commonwealth within ten (10) days after such change. Any Authority heretofore created under the laws of the Commonwealth of Pennsylvania, in addition to powers granted or conferred upon said Authority, shall possess all the powers provided in this act. 1945, May 2, P. L. 382, Sec. 3; 1947, June 12, P. L. 571, Sec. 1; 1952, Jan. 21, P. L. (1951) 2188, Sec. 2.

**Sec. 305. Amendment of articles**

A. An Authority, in the manner hereinafter provided, may from time to time, amend its articles:

(1) To adopt a new name;

(2) To add a provision therein increasing its term of existence to a date not exceeding fifty years from the date of approval of the articles of amendments or to modify any provision thereof limiting its terms of existence, by increasing such term to such a date;

(3) To change, add to, or diminish its powers or purposes, or to set forth different or additional powers or purposes;

(4) To increase or decrease the number of members of the board of the Authority, to reapportion the representation on the board of the Authority, and to revise the terms of office of such members, all in such manner as shall not be inconsistent with the provisions of section seven of this act.

* * * * * * * * *

**Sec. 306. Purposes and powers; general**

A. Every Authority incorporated under this act shall be a body corporate and politic, and shall be for the purpose of acquiring, holding, constructing, improving, maintaining and operating, owning, leasing, either in the capacity of lessor or lessee, projects of the following kind and character, buildings to be devoted wholly or partially for public uses, including public school buildings, and for revenue-producing purposes; transportation, marketing, shopping, terminals, bridges, tunnels, flood control projects, highways, parkways, traffic distribution centers, parking spaces, airports and all facilities necessary or

incident thereto, parks, recreation grounds and facilities, sewers, sewer systems or parts thereof, sewage treatment works, including works for treating and disposing of industrial waste, facilities and equipment for the collection, removal or disposal of ashes, garbage, rubbish and other refuse materials by incineration, land fill or other methods, steam heating plants and distribution systems, incinerator plants, waterworks, water supply works, water distribution systems, swimming pools, playgrounds, lakes, low head dams, hospitals, motor buses for public use, when such motor buses are to be used within any municipality, and subways: Provided, That an Authority created by a school district or school districts shall have the power only to acquire, hold, construct, improve, maintain, operate and lease public school buildings and other school projects acquired, constructed or improved for public school purposes. The purpose and intent of this act being to benefit the people of the Commonwealth by, among other things, increasing their commerce, health, safety and prosperity, and not to unnecessarily burden or interfere with existing business by the establishment of competitive enterprises, none of the powers granted by this act shall be exercised in the construction, improvement, maintenance, extension or operation of any project or projects which in whole or in part shall duplicate or compete with existing enterprises serving substantially the same purposes. This limitation shall not apply to the exercise of the powers granted hereunder for facilities and equipment for the collection, removal or disposal of ashes, garbage, rubbish and other refuse materials by incineration, land fill or other methods, if each municipality organizing or intending to use the facilities of an Authority having such powers shall declare by resolution or ordinance that it is

desirable for the health and safety of the people of such municipality that it use the facilities of the Authority, and if any contract between such municipality and any other person, firm or corporation for the collection, removal or disposal of ashes, garbage, rubbish and other refuse material has by its terms expired or is terminable at the option of the municipality or will expire within six months from the date such ordinance becomes effective. The municipality or municipalities organizing such an Authority may, in the resolution or ordinance signifying their intention so to do, or from time to time by subsequent resolution or ordinance, specify the project or projects to be undertaken by the said Authority, and no other projects shall be undertaken by the said Authority than those so specified. If the municipal authorities organizing an Authority fail to specify the project or projects to be undertaken, then the Authority shall be deemed to have all the powers granted by this act.

B. Every Authority is hereby granted, and shall have and may exercise all powers necessary or convenient for the carrying out of the aforesaid purposes, including but without limiting the generality of the foregoing, the following rights and powers:

(a) To have existence for a term of fifty years and for such further period or periods as may be provided in articles of amendment approved under subsection E of section three point two.

(b) To sue and be sued, implead and be impleaded, complain and defend in all courts.

(c) To adopt, use and alter at will, a corporate seal.

(d) To acquire, purchase, hold, lease as lessee and use any franchise, property, real, personal or mixed, tangi-

ble or intangible, or any interest therein necessary or desirable for carrying out the purposes of the Authority, and to sell, lease as lessor, transfer and dispose of any property or interest therein at any time acquired by it.

(e) To acquire by purchase, lease or otherwise, and to construct, improve, maintain, repair and operate projects.

(f) To make by-laws for the management and regulation of its affairs.

(g) To appoint officers, agents, employes and servants, to prescribe their duties and to fix their compensation.

(h) To fix, alter, charge and collect rates and other charges in the area served by its facilities at reasonable and uniform rates to be determined exclusively by it, for the purpose of providing for the payment of the expenses of the Authority, the construction, improvement, repair, maintenance and operation of its facilities and properties, the payment of the principal of and interest on its obligations, and to fulfill the terms and provisions of any agreements made with the purchasers or holders of any such obligations, or with the municipality incorporating or municipalities which are members of said Authority or with any municipality served or to be served by said Authority, and to determine by itself exclusively the services and improvements required to provide adequate, safe and reasonable service, including extensions thereof, in the areas served: Provided, That if the service area includes more than one municipality, the revenues from any project shall not be expended directly or indirectly on any other project, unless such expenditures are made for the benefit of the entire service area. Any person questioning

the reasonableness or uniformity of any rate fixed by any Authority or the adequacy, safety and reasonableness of the Authority's services, including extensions thereof, may bring suit against the Authority in the court of common pleas of the county wherein the project is located, or if the project is located in more than one county then in the court of common pleas of the county wherein the principal office of the project is located. The court of common pleas shall have exclusive jurisdiction to determine all such questions involving rates of service. Appeals may be taken to the Superior Court within thirty days after the court of common pleas has rendered a final decision.

(i) To borrow money, make and issue negotiable notes, bonds, refunding bonds, and other evidences of indebtedness or obligations (herein called "bonds") of the Authority, said bonds to have a maturity date not longer than forty years from the date of issue, except that no refunding bonds shall have a maturity date later than the life of the Authority, and to secure the payment of such bonds or any part thereof by pledge or deed of trust of all or any of its revenues and receipts, and to make such agreements with the purchasers or holders of such bonds, or with others in connection with any such bonds, whether issued or to be issued, as the Authority shall deem advisable, and in general to provide for the security for said bonds and the rights of the holders thereof, and in respect to any project constructed and operated under agreement with any Authority or any public Authority of any adjoining state, to borrow money and issue such notes, bonds and other evidences of indebtedness and obligations jointly with any such Authority.

(j) To make contracts of every name and nature and to execute all instruments necessary or convenient for the carrying on of its business.

(k) Without limitation of the foregoing, to borrow money and accept grants from and to enter into contracts, leases or other transactions with any Federal agency, Commonwealth of Pennsylvania, municipality, school district, corporation or Authority.

(l) To have the power of eminent domain.

(m) To pledge, hypothecate or otherwise encumber all or any of the revenues or receipts of the Authority as security for all or any of the obligations of the Authority.

(n) To do all acts and things necessary or convenient for the promotion of its business and the general welfare of the Authority, to carry out the powers granted to it by this act or any other acts.

(o) To contract with any municipality, corporation, or any public Authority of this or any adjoining state, on such terms as the said Authority shall deem proper, for the construction and operation of any project which is partly in this Commonwealth and partly in such adjoining state.

(p) To enter into contracts to supply water and other services to and for municipalities that are not members of the Authority, or to and for the Commonwealth of Pennsylvania, municipalities, school districts, persons or authorities, and fix the amount to be paid therefor.

(q) To enter into contracts of group insurance for the benefit of its employes, and to set up a retirement or pension fund for such employes.

(r) To charge the cost of construction of any sewer constructed by the Authority against the properties benefited, improved or accommodated thereby to the extent of such benefits. Such benefits shall be assessed in the manner provided by section eleven of this act for the exercise of the right of eminent domain.

(s) To charge the cost of construction of any sewer constructed by the Authority against the properties benefited, improved or accommodated thereby according to the foot front rule. Such charges shall be based upon the foot frontage of the properties so benefited, and shall be a lien against such properties. Such charges may be assessed and collected and such liens may be enforced in the manner provided by law for the assessment and collection of charges and the enforcement of liens of the municipality in which such Authority is located: Provided, That no such charge shall be assessed unless prior to construction of such sewer the Authority shall have submitted the plan of construction and estimated cost to the municipality in which such project is to be undertaken, and the municipality shall have approved such plan and estimated cost: And provided further, That there shall not be charged against the properties benefited, improved or accommodated thereby an aggregate amount in excess of the estimated cost as approved by the municipality.

(t) To charge a tapping fee whenever the owner of any property connects such property with a sewer system constructed by the Authority which fee shall be in addition to any charges assessed and collected against such property in the construction of such sewer by the Authority or any rental charges assessed by the Authority.

• • • • • • • • •

C. The Authority shall have no power at any time or in any manner to pledge the credit or taxing power of the Commonwealth of Pennsylvania or any political subdivision, nor shall any of its obligations be deemed to be obligations of the Commonwealth of Pennsylvania or of any of its political subdivisions, nor shall the Commonwealth of Pennsylvania or any political subdivision thereof be liable for the payment of principal of or interest on such obligations. 1945, May 2, P. L. 382, Sec. 4; 1947, June 12, P. L. 571, Sec. 1; 1951, Sept. 26, P. L. 1507, Sec. 1; 1952, Jan. 21, P. L. (1951) 2188, Secs. 4, 5; 1953, Aug. 24, P. L. 1338, Sec. 1; 1955, July 27, P. L. 282, Sec. 1; 1955, Oct. 7, P. L. 671, Sec. 1.

**Sec. 307. Purposes and powers; bonds**

A. The bonds of any Authority hereinabove referred to and authorized to be issued, shall be authorized by resolution of the board thereof and shall be of such series, bear such date or dates, mature at such time or times, not exceeding forty years from their respective dates, bear interest at such rate or rates, not exceeding six per cent per annum, payable semi-annually, be in such denominations, be in such form, either coupon or fully registered without coupons, carry such registration, exchangeability and interchangeability privileges, be payable in such medium of payment and at such place or places, be subject to such terms of redemption not exceeding one hundred five per cent of the principal amount thereof, and be entitled to such priorities in the revenues or receipts of such Authority as such resolution or resolutions may provide. The bonds shall be signed by such officers as the Authority shall determine, and coupon bonds shall have attached thereto interest coupons bearing the facsimile signature

of the treasurer of the Authority, all as may be prescribed in such resolution or resolutions. Any such bonds may be issued and delivered, notwithstanding that one or more of the officers signing such bonds or the treasurer whose facsimile signature shall be upon the coupon or any thereof, shall have ceased to be such officer or officers at the time when such bonds shall actually be delivered.

Said bonds may be sold at public or private sale for such price or prices as the Authority shall determine, provided that the interest cost to maturity of the money received for any issue of said bonds shall not exceed six per centum per annum. Pending the preparation of the definitive bonds, interim receipts may be issued to the purchaser or purchasers of such bonds, and may contain such terms and conditions as the Authority may determine.

B. Any resolution or resolutions authorizing any bonds may contain provisions which shall be part of the contract with the holders thereof, as to (a) pledging the full faith and credit of the Authority (but not of the Commonwealth of Pennsylvania or any political subdivision thereof) for such obligations, or restricting the same to all or any of the revenues of the Authority from all or any projects or properties, (b) the construction, improvement, operation, extension, enlargement, maintenance and repair of the project and the duties of the Authority with reference thereto, (c) the terms and provisions of the bonds, (d) limitations on the purposes to which the proceeds of the bonds then or thereafter to be issued, or of any loan or grant by the United States may be applied, (e) the rate of tolls and other charges for use of the facilities of or for the services rendered by the Authority, (f) the setting aside of reserves or sinking funds and the

regulation and disposition thereof, (g) limitations on the issuance of additional bonds, (h) the terms and provisions of any deed of trust or indenture securing the bonds, or under which the same may be issued, and (i) any other or additional agreements with the holders of the bonds.

C. Any Authority may enter into any deeds of trust, indentures or other agreements, with any bank or trust company, or other person or persons in the United States having power to enter into the same, including any Federal agency, as security for such bonds, and may assign and pledge all or any of the revenues or receipts of the Authority thereunder. Such deed of trust, indenture or other agreement, may contain such provisions as may be customary in such instruments, or as the Authority may authorize, including (but without limitation) provisions as to (1) the construction, improvement, operation, maintenance and repair of any project, and the duties of the Authority with reference thereto, (2) the application of funds and the safeguarding of funds on hand or on deposit, (3) the rights and remedies of said trustee and the holders of the bonds (which may include restrictions upon the individual right of action of such bondholders), and (4) the terms and provisions of the bonds or the resolutions authorizing the issuance of the same.

Said bonds shall have all the qualities of negotiable instruments under the law merchant and the negotiable instruments law of the Commonwealth of Pennsylvania. 1945, May 2, P. L. 382, Sec. 5.

**Sec. 309. Governing body**

A. The powers of each Authority shall be exercised by a governing body (herein called the "Board") composed as follows:

(a) If the Authority is incorporated by one municipality the board shall consist of such number of members not less than five as shall be set forth in the articles of incorporation or amendment thereto. The governing body of such municipality shall appoint the members of the board, whose terms of office shall commence on the date of appointment. Unless otherwise provided in the articles of incorporation or amendment thereto, one member shall serve for one year, one for two years, one for three years, one for four years and one for five years from the January first next succeeding the date of incorporation, and if there are more than five members of the board, their terms shall be staggered in a similar manner. Thereafter whenever a vacancy has occurred or is about to occur by reason of the expiration of the term of any member, the said governing body shall appoint a member of the board for a like term to succeed the member whose term has expired or is about to expire.

(b) If the Authority is incorporated by two or more municipalities, the board shall consist of a number of members at least equal to the number of municipalities incorporating the Authority, but in no event less than five. When one or more additional municipalities join an existing Authority, each of such joining municipalities shall have such membership on the board as the municipalities then members of the Authority and the joining municipalities may determine by appropriate resolutions. Such member or members representing the joining municipality or municipalities shall be appointed, immediately upon the admission of such municipality or municipalities into the Authority, for the term of years provided in the application for membership required by section three point one of this act.

Except as herein provided for transit authorities created for the purpose of eliminating grade crossings, the members of the board, each of whom shall be a citizen of the municipality by which he is appointed or a citizen of a municipality into which one or more of the projects of the Authority extends or is to extend or to which one or more of said projects has been or is to be leased, shall be appointed, their terms fixed and staggered, and vacancies filled, and where two or more municipalities are members of the Authority, shall be apportioned in such manner as the articles of incorporation, the amendments thereof or the application for membership required by section three point one of this act shall provide.

If the Authority is created for the purpose of eliminating grade crossings, the members of the board, the majority of whom shall be citizens of the municipality by which they are appointed or of a municipality into which one or more of the projects of the Authority extends or is to extend or to which one or more of said projects has been or is to be leased, shall be appointed, their terms fixed and staggered, and vacancies filled, and where two or more municipalities are members of the Authority, shall be apportioned in such manner as the articles of incorporation, the amendments thereof or the application for membership required by section 3.1 of this act shall provide.

B. Members shall hold office until their successors have been appointed, and may succeed themselves, and, except members of the boards of Authorities organized or created by a school district or school districts, shall receive such salaries as may be determined by the governing body or bodies of the municipality or municipalities, but

none of such salaries shall be increased or diminished by such governing body or bodies during the term for which the member receiving the same shall have been appointed. Members of the board of any Authority organized or created by a school district or school districts shall receive no compensation for their services, but the members of such board in office on the effective date of this amendment shall continue to receive their salaries during the remainder of their existing term. A member may be removed for cause by the court of quarter sessions of the county in which the Authority is located after having been provided with a copy of the charges against him for at least ten days and full hearing by the court. If a vacancy shall occur by reason of the death, disqualification, resignation or removal of a member, the municipal authorities shall appoint a successor to fill his unexpired term. In joint Authorities such vacancies shall be filled by the municipal Authorities of the municipality in the representation of which the vacancy occurs. Whenever any municipality shall withdraw from a joint Authority the term of any member or members appointed from such municipality shall immediately terminate.

C. A majority of the members shall constitute a quorum of the board for the purpose of organizing the Authority and conducting the business thereof and for all other purposes, and all action may be taken by vote of a majority of the members present, unless in any case the by-laws shall require a larger number. The board shall have full authority to manage the properties and business of the Authority and to prescribe, amend and repeal by-laws, rules and regulations governing the manner in which the business of the Authority may be conducted, and the

powers granted to it may be exercised and embodied. The board shall fix and determine the number of officers, agents and employes of the Authority and their respective powers, duties and compensation and may appoint to such office or offices any member of the board with such powers, duties and compensation as the board may deem proper. The treasurer of the board of any Authority organized or created by a school district or school districts shall give bond in such sums as may be fixed by the by-laws, which bond shall be subject to the approval of the board and the premiums for which shall be paid by the Authority. 1945, May 2, P. L. 382, Sec. 7; 1947, June 12, P. L. 571, Sec. 1; 1949, May 2, P. L. 850, No. 226, Sec. 1; 1952, Jan. 21, P. L. (1951) 2188, Sec. 6; 1953, July 25, P. L. 579, Sec. 1; 1953, July 27, P. L. 639, Sec. 1; 1956, May 24, P. L. (1955) 1690, Sec. 1.

**Sec. 310. Moneys of the Authority**

All moneys of any Authority, from whatever source derived, shall be paid to the treasurer of the Authority. Said moneys shall be deposited in the first instance by the treasurer in one or more banks or trust companies in one or more special accounts, and each of such special accounts to the extent the same is not insured shall be continuously secured by a pledge of direct obligations of the United States of America, of the Commonwealth or of the municipality or municipalities creating the Authority, having an aggregate market value, exclusive of accrued interest, at all times at least equal to the balance on deposit in such account. Such securities shall either be deposited with the treasurer, or be held by a trustee or agent satisfactory to the Authority. All banks and trust companies are authorized to give such security for such deposits. The

moneys in said accounts shall be paid out on the warrant or other order of the chairman of the Authority, or of such other person or persons as the Authority may authorize to execute such warrants or orders. Every Authority shall have at least an annual examination of its books, accounts and records by a certified public accountant. A copy of such audit shall be delivered to the municipality or municipalities creating the Authority. A concise financial statement shall be published annually, at least once in a newspaper of general circulation in the municipality where the principal office of the Authority is located. If such publication is not made by the Authority, the municipality or municipalities shall publish such statement at the expense of the Authority. If the Authority fails to make such an audit, then the controller, auditors or accountant designated by the municipality or municipalities, are hereby authorized and empowered from time to time to examine at the expense of the Authority the accounts and books of the Authority, including its receipts, disbursements, contracts, leases, sinking funds, investments, and any other matters relating to its finances, operation and affairs.

The Attorney General of the Commonwealth of Pennsylvania shall have the right to examine the books, accounts and records of any Authority. 1945, May 2, P. L. 382, Sec. 8.

**Sec. 312. Competition in award of contracts**

A. All construction, reconstruction, repairs or work of any nature made by any Authority where the entire cost, value or amount of such construction, reconstruction, repairs or work, including labor and materials, shall exceed five hundred dollars ($500.00), except construction

reconstruction, repairs or work done by employees of said Authority, or by labor supplied under agreement with any Federal or State agency, with supplies and materials purchased as hereinafter provided, shall be done only under contract or contracts to be entered into by the Authority with the lowest responsible bidder upon proper terms, after due public notice has been given asking for competitive bids as hereinafter provided. No contract shall be entered into for construction or improvement or repair of any project or portion thereof, unless the contractor shall give an unertaking with a sufficient surety or sureties approved by the Authority, and in an amount fixed by the Authority, for the faithful performance of the contract: All such contracts shall provide among other things that the person or corporation entering into such contract with the Authority will pay for all materials furnished and services rendered for the performance of the contract, and that any person or corporation furnishing such materials or rendering such services may maintain an action to recover for the same against the obligor in the undertaking, as though such person or corporation was named therein, provided the action is brought within one year after the time the cause of action accrued. Nothing in this section shall be construed to limit the power of the Authority to construct, repair or improve any project or portion thereof, or any addition, betterment or extension thereto, directly by the officers, agents and employes of the Authority, or otherwise than by contract.

B. All supplies and materials costing five hundred dollars ($500.00) or more shall be purchased only after due advertisement as hereinafter provided. Authority shall accept the lowest bid or bids, kind, quality and material

being equal, but the Authority shall have the right to reject any or all bids or select a single item from any bid. The provisions as to bidding shall not apply to the purchase of patented and manufactured products offered for sale in a noncompetitive market or solely by a manufacturer's authorized dealer.

C. The terms advertisement or due public notice wherever used in this section, shall mean a notice published at least ten (10) days before the award of any contract, in a newspaper of general circulation published in the municipality where the authority has its principal office, and if no newspaper is published therein then by publication in a newspaper in the county where the Authority has its principal office: Provided, That, such notice may be waived where the Authority determines an emergency exists, and such supplies and materials must be immediately purchased by the said Authority.

D. No member of the Authority or officer or employe thereof shall either directly or indirectly be a party to or be in any manner interested in any contract or agreement with the Authority for any matter, cause or thing whatsoever by reason whereof any liability or indebtedness shall in any way be created against such Authority. If any contract or agreement shall be made in violation of the provisions of this section the same shall be null and void and no action shall be maintained thereon against such Authority.

* * * * * * * * *

**Sec. 318. Exemption from taxation**

The effectuation of the authorized purposes of Authorities created under this act shall and will be in all

respects for the benefit of the people of the Commonwealth of Pennsylvania, for the increase of their commerce and prosperity, and for the improvement of their health and living conditions, and since such Authorities will be performing essential governmental functions in effectuating such purposes, such Authorities shall not be required to pay any taxes or assessments upon any property acquired or used by them for such purposes, and the bonds issued by any Authority, their transfer and the income therefrom (including any profits made on the sale thereof) shall at all times be free from taxation within the Commonwealth of Pennsylvania, 1945, May 2, P.L. 382, Sec. 15.

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ACT OF JULY 18, 1935, P.L. 1286, 53
PURDON'S STATUTES

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**Sec. 2231. Rentals for use of sewage system**

Whenever any county of the second class, city, borough, incorporated town, or township, either singly or jointly with other municipalities or townships (a) has, wholly or partially, constructed or completed or shall hereafter, wholly or partially, construct or complete any sewer, sewerage system or sewage treatment works, either wholly or partially at public expense, or (b) has acquired or shall hereafter acquire the same, either wholly or partially at public expense, or (c) has entered or shall hereafter enter into any contract with any authority established in accordance with law or with any private corporation for the design or construction of sewers, sewerage systems or sewage treatment works or for the furnishing of sewer, sewerage or sewage treatment services, for its or their benefit and the benefit of the inhabitants thereof,

such county of the second class, city, borough, incorporated town, or township may provide by ordinance or resolution, enacted either before or after the acquisition or construction thereof, or the entry into such contract, for the imposition and collection of an annual rental, rate or charge for the use of such sewer, sewerage system, or sewage treatment works from the owners of, or the users of water in or on the property served or to be served by it, or from both the owner and the water user, whether such property is located within or without the corporate limits of such county of the second class, city, borough, town, or township.

The annual rental, rate or charge so imposed shall be a lien on the properties served, and such liens may be filed in the office of the prothonotary and collected in the manner provided by law for the filing and collection of municipal claims. 1935, July 18, P.L. 1286, Sec. 1; 1937; May 14, P.L. 630, Sec. 1; 1949, April 18, P.L. 499, Sec. 1.

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## ACT OF APRIL 14, 1949, P.L. 482, 53 PURDON'S STATUTES

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**Sec. 2261. Shutting off water if sewer charges not paid**

If the owner or occupant of premises served by any water utility, as hereinafter defined, shall neglect or fail to pay, for a period of thirty (30) days from the due date thereof, any rental, rate or charge for sewer, sewerage, or sewage treatment service imposed by any municipal authority organized by any county of the second class, by any city of the second class, by any city of the second class A, by any city of the third class or by any borough, such

water utility is hereby authorized and required, at the request and direction of such authority, or of the city, borough, or township to which the authority shall have assigned its claim or lien for such service, to shut off the supply of water to such premises until all such overdue rentals, rates and charges, together with any penalties and interest thereon, shall be paid. If such authority or such city, borough, or township shall also supply water to any premises, it is hereby authorized to shut off the supply of water to such premises, as herein set forth. 1949, April 14, P.L. 482, Sec. 1; 1951, Jan. 14 (1952), P.L. 2040, Sec. 1; 1955, Sept. 7, P.L. 576, Sec. 1.

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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1958**

**NO. 418**

LUCIAN J. CILETTI, GEORGE H. KRAUSE, ALLAN SCHULTZ, in their own behalf and in behalf of other citizens of the City of Washington and Borough of East Washington,
Appellants

v.

THE CITY OF WASHINGTON, BOROUGH OF EAST WASHINGTON, WASHINGTON-EAST WASHINGTON JOINT AUTHORITY, THE CITIZENS WATER COMPANY OF WASHINGTON, PENNSYLVANIA, and MELLON NATIONAL BANK AND TRUST COMPANY, Defendants, and PEOPLES BANK OF UNITY, JAMES M. LAMBIE and RUSSELL M. WYLIE, Intervening Defendants, Appellees

On Appeal from the Supreme Court of Pennsylvania

## MOTION TO DISMISS APPEAL AND BRIEF FOR THE APPELLEES IN SUPPORT THEREOF AND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

NO. 418

LUCIAN J. CILETTI, GEORGE H. KRAUSE, ALLAN SCHULTZ, in their own behalf and in behalf of other citizens of the City of Washington and Borough of East Washington,
Appellants

v.

THE CITY OF WASHINGTON, BOROUGH OF EAST WASHINGTON, WASHINGTON-EAST WASHINGTON JOINT AUTHORITY, THE CITIZENS WATER COMPANY OF WASHINGTON, PENNSYLVANIA, and MELLON NATIONAL BANK AND TRUST COMPANY, Defendants, and PEOPLES BANK OF UNITY, JAMES M. LAMBIE and RUSSELL M. WYLIE, Intervening Defendants, Appellees

On Appeal from the Supreme Court of Pennsylvania

## MOTION TO DISMISS APPEAL AND BRIEF FOR THE APPELLEES IN SUPPORT THEREOF AND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Appellees move the Court to dismiss the appeal herein on the following grounds:

I. The appeal is not within the jurisdiction of this Court because not taken in conformity to the statute or to the Court's rules.

II. No substantial federal question is presented by the appeal.

III. The federal question sought to be reviewed by the appeal was not properly raised before or expressly passed on by the Supreme Court of Pennsylvania.

IV. The judgment of the Supreme Court of Pennsylvania rests on an adequate non-federal basis.

In addition, if the papers whereon the appeal was taken are treated as a petition for writ of certiorari, the petition should be denied.

## ARGUMENT

The provisions of 28 U. S. C. § 1257 pertinent to this appeal and in the alternative to the petition for certiorari are as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> " . . .
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> "(3) By writ of certiorari, where the validity of a . . . State statute is drawn in question on the ground of its being repugnant to the Constitution . . . of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of . . . the United States."

**I. The appeal is not within the jurisdiction of this Court because not taken in conformity to the statute or to the Court's rules.**

This appeal is not within the jurisdiction of the Court because it has not been taken in conformity with the provisions of the above-quoted statute. For the reasons shown below, there was not drawn in question the validity of a state statute on the ground of its being repugnant to the Constitution of the United States, and

there was no decision in favor of the validity of such a statute under the Federal Constitution.

First, the appellants did not properly draw in question under the United States Constitution the constitutionality of the Pennsylvania Municipality Authorities Act of 1945 or any of the other statutes (Appendix A, pp. 58a-81a) which appellants' Jurisdictional Statement asserts to be involved. Instead, the appellants mainly urged the invalidity of certain contracts entered into by the appellees and others. However, if any of these had been invalid, it would have been by virtue of the state constitution and laws, not the Federal Constitution.

It is true that the Amended Complaint (Appendix C, 40a) alleged that said Acts were repugnant to the Constitution of the United States, but such allegations were not urged before the Pennsylvania Supreme Court. Nowhere in their brief filed with that Court did the appellants specifically argue that federal questions were involved (Appendix B). In fact, not one federal court decision was cited in appellants' brief (See Table of Citations, Appendix B, pp. iii-v). The same Table of Citations shows that not even the Constitution of the United States was cited by the appellants. Rather, appellants contented themselves with statements that the acts and statutes complained of were not "valid" (Appendix B, 12a) or "constitutional" (Appendix B, 104a).

It is, therefore, understandable that the Pennsylvania Supreme Court made no decision in favor of the constitutional validity of the statutes when tested by the United States Constitution. Its opinion (Appendix A, 47a) contains the following sentence:

*Argument.*

> "It is unnecessary to discuss and decide each of appellants' numerous contentions because we are of the opinion that their action is barred by laches." (Appendix A, 49a)

Thus, it clearly appears that neither the validity of the statutes was properly drawn in question nor was there any decision of the highest state court in favor of validity. As a consequence, even if there had been a federal question, it must be deemed to have been waived, and there is nothing to support the appeal jurisdiction in this Court. *Congress of Industrial Organizations v. McAdory,* 325 U. S. 472, 89 L. Ed. 1741 (1945); *Beaty v. Richardson,* 276 U. S. 599, 72 L. Ed. 724 (1928).

Further, the appeal is not within the jurisdiction of this Court because it has not been taken in conformity with the Court's Revised Rules. Rule 15 pertaining to the jurisdictional statement requires that it contain a concise statement of the grounds on which the jurisdiction of this Court is invoked, including cases believed to sustain the jurisdiction (Rule 15 1 (b) (iv)). The appellants' jurisdictional statement contains no such cases. In addition, Rule 15 requires the questions presented by the appeal to be stated without unnecessary detail (Rule 15 1 (c) (i)) and also requires that the statement of the case be concise (Rule 15 1 (d)). In contrast, the appellants take five printed pages to present their questions (pp. 3-7) and five additional pages to state their case (pp. 9-14). Appellants' Statement of the Case is replete with irrelevancies and largely disregards the trial court's Findings of Fact (Appendix C, pp. 352a-377a). The relevant facts are succinctly recited in the opinion of the Pennsylvania Supreme Court, (Appendix A, 48a et seq.)

Nor may the appellants conscientiously assert that in accordance with paragraph 1 (d) of Rule 15 they have provided specific reference to the places in the record where appears the matter which will support their assertion that the rulings of the Pennsylvania Supreme Court "were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court."

**II. No substantial federal question is presented by the appeal.**

As already noted, paragraph 59 of the Amended Complaint (Appendix C, 40a) contains the only allegation made by the appellants to the effect that the Pennsylvania statutes cited by appellants conflict with the United States Constitution. It has been shown, however, that such claims were not urged upon the Pennsylvania Supreme Court. Other allegations regarding constitutionality were mere references to an "unlawful and unconstitutional delegation of authority" (Appendix C, 37a), to ordinances and contracts that were supposedly "unlawful, unconstitutional and void" (Appendix C, 38a), to ordinances imposing a tax "in violation of the Constitutions of Pennsylvania and the United States" (Appendix C, 341a), to "a violation of due process" (Appendix A, 40a) and to "constitutional issues" (Appendix A, 44a).

Under many decisions of this Court it has been held that the Court will not take cognizance of claims based on such passing references. To present properly a federal question, care must be taken to refer clearly to the particular clause or clauses of the federal Constitution, as well as the rights claimed thereunder, in order to

bring the matter to the attention of the state court. *Herndon v. Georgia,* 295 U. S. 441, 79 L. Ed. 1530 (1935); *New York ex rel. Bryant v. Zimmerman,* 278 U. S. 63, 73 L. Ed. 184 (1928); and *F. G. Oxley Stave Company v. County of Butler,* 166 U. S. 648, 41 L. Ed. 1149 (1897).

Nor did the appellants present their "constitutional" objections to the Supreme Court of Pennsylvania in a manner which left no doubt that reliance was placed on federal, rather than state, rights. For example, the Pennsylvania Constitution, as well as the United States Constitution, contains a due process clause. Pa. Const. Art. I §9. If it is not made clear that the federal, rather than the state, constitution is involved, it will be assumed that reference is being made to the state constitution. *Bowe v. Scott,* 233 U. S. 658, 58 L. Ed. 1141 (1914); *New York ex rel. Bryant v. Zimmerman,* supra (278 U. S. 63).

By their lack of particularity in constitutional references and their failure to urge federal constitutional questions in the appellate state court, appellants waived any federal question. Consequently, no substantial federal question is presented by the appeal.

**III. The federal question sought to be reviewed by the appeal was not properly raised or expressly passed on by the Supreme Court of Pennsylvania.**

The failure to raise a federal question before the Pennsylvania Supreme Court has been dealt with in Sections I and II above. A reading of the opinion of that Court on the matter (Appendix A, 47a) discloses that the Court did not pass on any federal question. Rather, after reciting the facts of the case, the Court stated that,

"It is unnecessary to discuss and decide each of appellants' numerous contentions because we are of the opinion that their action is barred by laches" (Appendix A, 49a). The Court then concluded its brief opinion by discussing the laches present in the case.

It is true, of course, that Federal rights may be denied by a refusal of a state court to consider and decide questions, no less than by an erroneous decision. But, in order to have a state decision by inaction, the federal question must have been fairly presented to the state court and its decision must have been necessary to the determination of the cause. *Bell's Gap R.R. Co. v. Commonwealth of Pennsylvania,* 134 U. S. 232, 33 L. Ed. 892 (1890); and *Chapman v. Crane,* 123 U. S. 540, 31 L. Ed. 235 (1887). As already shown, no federal question was before the Pennsylvania Supreme Court. Further, in the case at bar there was no need for the Pennsylvania Supreme Court to pass upon a federal question (not even argued before it), because that court's decision could and did rest solely upon an adequate non-federal basis, i. e. the appellants' laches.

**IV. The judgment of the Supreme Court of Pennsylvania rests on an adequate non-federal basis.**

This Court has consistently followed the principle that it will not review a judgment of a state court based upon an adequate non-federal ground, even if a federal question may have been involved and may even have been wrongly decided by the state court. *Herb v. Pitcairn,* 324 U. S. 117, 89 L. Ed. 789 (1945); *Fox Film Corporation v. Muller,* 296 U. S. 207, 80 L. Ed. 158 (1935). The

reason for such practice was well expressed by Mr. Justice Jackson as follows:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds . . . The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our jurisdiction. Our only power over state judgments is to correct them to the extent that they inaccurately adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we correct its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb v. Pitcairn,* supra (324 U. S. 117, 125-126, 89 L. Ed. 789, 794).

In the case at bar, the Pennsylvania Supreme Court based its judgment on one ground only, i. e. laches. In doing so, it followed its prior ruling in *Neizer v. Schuylkill Township School District,* 384 Pa. 323, 121 A. 2d 93 (1956), a case involving the same Pennsylvania statute and facts almost identical with those in this litigation.

This Court has held many times that where a state court bases its judgment on laches and the decision is made in good faith, its judgment is adequate and so defeats review by this Court. *Utley v. St. Petersburg,* 292 U. S. 106, 78 L. Ed. 1155 (1934); *Wood v. Chesborough,* 228 U. S. 672, 57 L. Ed. 1018 (1913); *Preston v. Chicago,* 226 U. S. 447, 57 L. Ed. 293 (1913).

To say that this Court has many times held laches to be an adequate non-federal basis for dismissing an appeal or denying a petition for certiorari is not, of course, to say that the Court has no right to examine the state court's decision so as to assure itself that the finding of laches is reasonable and not merely a subterfuge for a means to deny a federal right. *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673, 74 L. Ed. 1107 (1930); *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux,* 279 U. S. 737, 73 L. Ed. 931 (1929). Nevertheless, it is clear from a reading of the opinion of the Pennsylvania Supreme Court (Appendix A, 48-50a) that the facts of the case recited therein establish laches beyond any doubt.

**V. If the papers whereon the appeal was taken are treated as a petition for writ of certiorari, the petition should be denied.**

28 U. S. C. § 2103 directs that if an appeal is improvidently taken in a case where the proper mode of review is by petition for certiorari, the papers whereon the appeal is taken shall be regarded and acted on as a petition for a writ of certiorari. If in the present case the Court takes this course, it is clear that the petition must be denied. First, it should be denied for jurisdictional reasons appearing from the discussion in Sections I through IV above. Secondly, it should be denied for the reason that the appellants have failed to aver or prove (a) the involvement of the validity of a state statute, as against a claim of its repugnance to the federal Constitution; or (b) the involvement of any question of sufficient importance to warrant consideration by this Court.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal should be dismissed and that if the papers whereon the appeal was taken are treated as a petition for a writ of certiorari, the petition should be denied.

Respectfully submitted,

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November 1, 1958

In The

# Supreme Court of the United States

## No. 418 October Term, 1958

LUCIAN J. CILETTI, GEORGE H. KRAUSE, ALLAN SCHULTZ, in Their Own Behalf and in Behalf of Other Citizens of the City of Washington and Borough of East Washington,

Appellants

v

THE CITY OF WASHINGTON, BOROUGH OF EAST WASHINGTON, WASHINGTON-EAST WASHINGTON JOINT AUTHORITY, THE CITIZENS WATER COMPANY OF WASHINGTON, PENNSYLVANIA, and MELLON NATIONAL BANK AND TRUST COMPANY, Trustee, Defendants, and PEOPLES BANK OF UNITY, JAMES M. LAMBIE and RUSSELL M. WYLIE, Intervening Defendants,

Appellees

**On Appeal from the Supreme Court of Pennsylvania**

## APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS


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## APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS

Appellants respectfully submit the following reply to appellees' motion to dismiss served on appellants on October 30, 1958.

### I. THE APPEAL IS WITHIN THE JURISDICTION OF THIS COURT

Appellees concede (Appellees' Brief, p. 3) the specific constitutional repugnancies set forth by Appellants in the Amended Complaint (Appendix C, 40a), but contend that there was no decision in favor of the validity of the controversial statutes involved under the Federal Constitution: that "Nowhere in their brief filed with that Court did the Appellants specifically argue that federal questions were involved (Appendix B). In fact, not one federal court decision was cited in Appellants' brief (See Table of Citations, Appendix B, pp. iii-v)."

In every single brief filed by the Appellants with the courts below, including the two briefs filed by them with the Supreme Court of Pennsylvania in the two appeals taken in this case, the Appellants cited and argued, inter alia, the case of *William H. Carson v. Sewer Commission of Brockton*, 175 Mass. 242, 56 N.E. 1, 182 U.S. 398 (See Appendix B, page iv, and page 19 et seq.). Further, in Appellants' Petition for Rearguument addressed to the Su-

preme Court of Pennsylvania, the first specification of error recited (See Appendix A, p. 39):

> "1. The opinion does not consider the controlling decision of the United States Supreme Court in William H. Carson v. Sewer Commission of Brockton, 182 U.S. 393 (Record, 42a; Brief, 20)."

As to said Petition for Reargument, the Supreme Court of Pennsylvania entered its order: "April 17, 1958, Petition denied. Per Curiam." Invariably cited and argued to the Supreme Court of Pennsylvania, and to the lower court, was also the case of *Hamilton's Appeal*, 340 Pa. 17, stating, at page 22:

> "If the language of the Act can properly be construed as authorizing the imposition of charges except in proportion to the extent of the user, and, a fortiori, if it can be construed as authorizing the imposition of charges irrespective of any use, it is doubtful whether there is a sufficient expression of legislative intent to confine the charge within constitutional limits. See Carson v. Sewerage Comrs. of Brockton, 175 Mass. 242, 56 N.E. 1, aff'd 182 U.S. 398." The constitution here concerned is the federal constitution.

The lower court recognized (Appendix C, 351a):

> "It is contended that said Act conflicts with various sections of the Pennsylvania Constitution, and with certain provisions of the Federal Constitution." (See also Appendix C, p. 509a),

and in reply to said contentions the lower court affirmed the chancellor's findings and conclusions (See Jurisdic-

tional Statement, p. 14), and its decree based thereon was affirmed by the Supreme Court of Pennsylvania.

The last mentioned affirmance by the Supreme Court of Pennsylvania was an affirmative action sustaining the constitutional validity of the contracts, ordinances and statutes in controversy, thereby bringing this case within the purview of appeals allowed to this Court under the provisions cited in Appellants' Jurisdictional Statement, page 2.

A refusal by a state court to consider a federal question which, if considered, would have been controlling, is equivalent to a decision against the federal right involved therein: *Des Moines Navigation and Railroad Co. v. Iowa Homestead Co.*, 123 U.S. 552, 31 L. Ed. 202 (1887).

## II. THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Appellants' Petition for Reargument addressed to the Supreme Court of Pennsylvania (See Jurisdictional Statement, p. 39, and "Plaintiff's Memorandum Re Laches", p. 51, which was a part of said Petition, but had also been submitted previously to the court below pending proceedings in the lower court) was adequate, even if artless in some respects, to apprise the court and all interested parties of the specific federal questions involved and in controversy and requiring adjudication.

The substantiality of the questions will appear further throughout the remainder of this paper.

## III. THE FEDERAL QUESTIONS AS TO WHICH REVIEW IS SOUGHT BY THE INSTANT APPEAL WERE RAISED TIMELY AND PROPERLY

The last, and most serious, federal question proposed by appellants was the inadequacy of resting the dismissal of the numerous contentions, the many serious and important questions raised, on the revival of a laches plea many times discarded. The alleged wrongs, as to which laches might conceivably apply, were not all of one kind. One group included alleged instances of factual fraud, the determination of which might largely be affected by the credibility of witnesses heard and observed by the chancellor. Another, and more important group, would include contracts made and executed, and ordinances and statutes enforced up to the time plaintiffs' suit was filed. The provisions of such statutes and ordinances present pure questions of law for the courts to construe and apply. The right to complain of wrongs in this category may, in some instances, be barred by laches. A third group, and in the instant case the most important group, relates to the *continuing and prospective* enforcement of statutes and ordinances *after* suit filed declaring their repugnancy to both the state and federal constitutions. The citizen's immunity to deprivation of such a fundamental right by any plea of "laches" stands forth signally recognized in the case of *Wilson v. School District of Philadelphia*, 328 Pa. 225, 195 A. 90, quoted extensively in the Jurisdictional Statement, page 23, et seq. and cited to the Pennsylvania Supreme Court in the Petition for Reargument.

*Argument*

In the instant case, the peremptory dismissal of all of the people's rights and the complete denial of any relief whatsoever on the ground of laches, and their continued subjection to insufferable wrongs under the contracts, ordinances and statutes, cannot be reconciled with reasonableness, especially where it clearly appears in the record:

1. That the lower court had repeatedly discarded the plea of laches;

2. That the lower court refused to find many incontrovertible relevant and basic facts appearing in the record;

3. That the lower court affirmed many findings and conclusions contra evidence offered by the defendants themselves;

4. That the opinion and decree of the Pennsylvania Supreme Court violate the federal guarantees invoked and recognized in the case of *William H. Carson v. Sewer Commission of Brockton*, 182 U.S. 398, discussed supra;

5. That the opinion and decree violate the fundamental right of the citizen, despite laches, to invoke the protection of the federal constitution against the prospective enforcement of unconstitutional statutes and ordinances, as recognized by the Supreme Court of Pennsylvania in the case of *Wilson v. School District of Philadelphia*, discussed supra;

6. That the opinion and decree of the Pennsylvania Supreme Court violate the fundamental federal rights of the citizen as invoked and recognized by the Supreme Court of Pennsylvania in the case of *Gericke v. City of Philadelphia* (See Appendix B, p. 14, et seq.)

7. That the Pennsylvania Supreme Court opinion recognizes the validity of, but the decree violates the effect of the holding of the Supreme Court of Pennsylvania in the case of *Mitchell v. Chester Housing Authority*, discussed in the Jurisdictional Statement, page 22.

Appellees' objection (Brief, p. 6) that the Pennsylvania Supreme Court did not "expressly" pass on any federal questions is answered in the case of *Des Moines Navigation and Railroad Co.*, supra, and in the Jurisdictional Statement, pp. 36, 37.

Appellees' citations are inapt Typical, are these:

*Congress of Industrial Organizations v. McAdory*, 325 U.S. 472, was a case of no present urgency. The respondent had agreed not to enforce the Act complained of, and plaintiff was seeking a "declaratory judgment". In the case of *Beaty v. Richardson*, 276 U.S. 599, the appeal was dismissed for the reason that the federal questions sought to be presented were *by the record* abandoned in the State Supreme Court. In this connection, it may be mentioned that Appellants' contention in the case at bar that the Pennsylvania Supreme Court acted arbitrarily and capriciously could not be urged until after the matter complained of had transpired.

Presentation to the state courts of the federal questions involved in the instant case is adequately exampled in the cases already cited by Appellants, supra, and in the Jurisdictional Statement.

## IV. THE JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA CANNOT REST ON ANY ADEQUATE NON-FEDERAL BASIS

It is of course true as stated in Appellants' brief, page 8, that "This Court has held many times that where a state court bases its judgment on laches and the decision is made in good faith, its judgment is adequate and so defeats review by this Court." But in every case the judgment was in accord with the merits, and in no case cited was questionable laches permitted to preclude an attack on the *prospective* enforcement of an unconstitutional statute. Indeed, it is at least doubtful whether the Supreme Court of Pennsylvania would be willing to say even now, forthrightly, that laches bars the right to restrain the continuing prospective enforcement of unconstitutional and unconscionable statutes and ordinances. Nor is the "Neizer" case, cited by Appellees, a case controlling the case at bar. The contrast is fundamental, and is set forth in Appendix B, pp. 53, 54, wherein it is plain that in the Neizer case no one urged, nor can it be assumed that there existed, most of the fundamental objections pleaded and proved by the Appellants in the instant case.

It is the gist of Appellants' position in this Court that the refusal of the highest court of Pennsylvania to dispose of this litigation on its merits was a denial to the plaintiffs of judicial remedies which should be available to all citizens of Pennsylvania. Whether or not this denial was of itself an invasion of Appellants' rights to procedural and substantive due process, it is clear that Appellees may not urge that denial as a procedural bar in this court un-

der the pretext that Appellants failed to exhaust their state remedies.

It was urged upon the courts below, truthfully, that the insufferable wrongs perpetrated on the people in the name and under the provisions of the statutes and ordinances herein complained of could not be permitted to continue unabated without serious impairment of the public respect for and confidence in one of its most cherished institutions.

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## CONCLUSION

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For the foregoing reasons, and the reasons set forth in Appellants' Jurisdictional Statement, it is respectfully submitted that the federal questions presented are sufficiently substantial and urgent as to justify plenary consideration, and to permit the filing of briefs on the merits and oral argument for their resolution.

Respectfully submitted,
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Dated November 17, 1958